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In The
Supreme Court of the United States

NORTH JERSEY MEDIA GROUP INC.
and NEW JERSEY LAW JOURNAL

Petitioners,

v.

JOHN ASHCROFT, Attorney General of the United States, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On September 21, 2001, Chief Immigration Judge Michael Creppy issued a directive mandating that deportation proceedings shall be conducted in secret and entirely behind closed doors in all cases deemed by the Justice Department to be of special interest to the September 11 investigation. Pursuant to this directive, hearings are entirely closed without case-specific findings or any individualized showing that closure is necessary. The Sixth Circuit has held that the directive violates the First Amendment rights of the press and public; the Third Circuit in this case upheld the directive. The question presented is:

Whether, consistent with the First Amendment and federal law, the government may categorically close deportation proceedings in their entirety to the press and public whenever it unilaterally deems a case to be of interest to its September 11 investigation, without case-specific findings or any individualized showing that closure is necessary?

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellees below) are the North Jersey Media Group Inc. and the New Jersey Law Journal. Respondents (defendants-appellants below) are John Ashcroft, the Attorney General of the United States, and Michael Creppy, Chief Immigration Judge of the United States.

STATEMENT PURSUANT TO RULE 29.6

Petitioner North Jersey Media Group Inc. states that Macromedia Incorporated is its corporate parent, and that no publicly held corporation holds 10% or more of its stock.

Petitioner New Jersey Law Journal states that American Lawyer Media, Inc. is its corporate parent, and that no publicly held corporation holds 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

North Jersey Media Group Inc. and the New Jersey Law Journal respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-64a) is reported at 308 F.3d 198. The original and amended orders of the court of appeals denying the petition for rehearing *en banc* (App. 100a-03a) are unreported. The opinion of the district court (App. 65a-99a) is reported at 205 F. Supp. 2d 288.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 2002. Rehearing was denied on December 2, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition (App. 104a-09a) are pertinent provisions of the First Amendment to the United States Constitution, Sections 3.27 and 240.10(b) of Title 8 of the Code of Federal Regulations, and the closure directive at issue here.

STATEMENT

A. Introduction.

For the past 18 months, the country has been engaged in a profound national debate over how to accommodate our national security interests with those core constitutional

principles that have come to define us as a Nation. Among the central questions raised by that debate is the role of the press and public in our system of self-government. This case, in particular, involves the extent to which the Executive branch may unilaterally decide to place the deportation process beyond public scrutiny.

In the aftermath of the horrific attacks of September 11, hundreds of individuals were arrested and detained throughout the country, the vast majority of whom were non-citizens, and most of whom were reportedly detained in the New York/New Jersey area. The Justice Department regularly announced the number of such detentions and the press widely reported on these and other aspects of the government's post-September 11 actions. *See, e.g.*, Dan Eggen and Susan Schmidt, *Count of Released Detainees Is Hard to Pin Down*, Washington Post, Nov. 6, 2001 (noting Justice Department announcement). The treatment of the non-citizen detainees and the relationship between their deportation proceedings and the terrorism investigation became an issue of overwhelming public interest.

Ten days after September 11, however, Chief Immigration Judge Michael Creppy issued a directive, at the behest of the Attorney General, mandating the complete exclusion of the press and public (including family members) from every immigration hearing deemed by the Justice Department to be of interest to the government's terrorism investigation. The blanket closure directive prohibits any public docketing of these cases, mandates complete closure of the cases without particularized, case-specific findings, and allows for no process by which the press and public may contest the closure. Thus, the very fact of the hearings and their closure is made secret.

In response to a challenge by several New Jersey newspapers to the mandatory closure of these hearings, the Third Circuit in this case upheld the directive (over Judge Scirica's dissent), rejecting the newspapers' claim

that the First Amendment prohibits the government from categorically barring them from deportation proceedings without any particularized showing that closure is necessary in a given case. The Sixth Circuit earlier reached the opposite conclusion and unanimously struck down the directive on the ground that the First Amendment requires a particularized showing of need in support of closure. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). Both courts have now denied rehearing, leaving a direct circuit conflict on the constitutionality of the directive.

The newspapers respectfully submit that this case warrants the Court's attention, not only because of the disagreement between the Third and Sixth Circuits, but also because of the case's immense practical, doctrinal, and symbolic importance to the Nation as a whole. There have already been more than 600 individuals subjected to closed hearings, hearings in which the individual's liberty is directly at stake and in which the press and public have a vital interest. Whatever the proper outcome of this case, the court of appeals was surely correct in observing that the issues "go to the heart of our institutions, our national values, and the republic itself." App. 45a.

B. The "Special Interest" Detainees and the Creppy Closure Directive.

1. The government has detained a significant number of individuals inside the United States in the course of its investigation into the attacks of September 11, 2001. Among this group are so-called "special interest" immigration detainees. It is these non-citizens who are subject to the closure directive at issue here.

A "special interest" case is any case that the Justice Department unilaterally identifies as such. In the government's words, special interest immigration cases broadly include any case "in which the government has a

continuing investigative interest" – because, for example, the case has a "relationship to" or "involve[s] . . . information relating to" the September 11 investigation. Gov't Application For a Stay Pending Appeal to the United States Court of Appeals for the Third Circuit, at 5 (No. A-991). Based on documents released by the Justice Department, it appears that at least 765 individuals have thus far been placed into the "special interest" category. *See* Curt Anderson, *Most of Post-Sept. 11 Detainees Deported, Released or Guilty of Nonterror Offenses*, Associated Press, Dec. 11, 2002 (referring to Justice Department documents). None of the 765 has been charged with a terrorism-related criminal offense. Few, if any, of the 765 individuals have been charged and found deportable with terrorism-related violations under the *immigration* laws.[1]

2. Deportation proceedings are generally open to the public (including the press and family members). In particular, the current regulations governing access to deportation proceedings, which have remained materially unchanged since 1964, provide that deportation proceedings generally "shall be open" unless an immigration judge concludes in the exercise of "discretion" that closure is warranted for the "purpose of protecting witnesses, parties, or the public interest." *See* 8 C.F.R. 3.27; 240.10(b); *see generally Pechter v. Lyons*, 441 F. Supp. 115 (S.D.N.Y.

[1] In response to litigation under the Freedom of Information Act (FOIA), the government provided the immigration charges for the first 718 of the 765 non-citizens detained on immigration charges in relation to the September 11 investigation. *See Center for Nat'l Sec. Studies v. Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002) (No. 01-2500) (appeal pending). Of these 718, only two were apparently charged with a terrorism-related offense under the immigration laws and it is unknown whether those charges were ultimately pursued. The remaining 716 individuals were charged with visa violations or other non-terrorism related immigration offenses.

1977) (finding that closure order barring public from attending deportation hearing of alleged Nazi was abuse of discretion under the regulations because less restrictive alternatives were available to protect alien from hostile spectators).

Notwithstanding immigration judges' clear regulatory authority to close proceedings on an individualized basis in the interest of national security (*i.e.*, to protect the "public interest"), Chief Immigration Judge Michael Creppy issued a memorandum on September 21, 2001, to all immigration judges and court administrators outlining "additional security procedures" to be applied in deportation cases designated by the Justice Department for special treatment. App. 106a. The Creppy directive provides that in all of these special interest cases, deportation hearings will be held in secret and will be mandatorily closed from beginning to end, divesting individual immigration judges of their discretion to tailor closure orders to the particular circumstances of a given case.

Specifically, the directive provides that special interest cases must "be heard separately from all other cases on the docket;" that the cases must be closed to the public – "no visitors, no family, and no press;" and that the cases may not be discussed by "courtroom personnel, including both court employees and contract interpreters." The cases may be assigned only to judges "who currently hold at least a secret clearance" because "some of these cases may ultimately involve classified evidence." Further, the "Record of Proceeding" may be released only to "an attorney or representative" who has entered an appearance in the case ("assuming the file does not contain classified information"), but not to "anyone" other than those individuals. And finally, the very existence of the case is to be kept confidential: the "restriction on information includes confirming or denying whether such a case is on the docket;" in addition, the cases may not be listed on the

"court calenders posted outside the courtrooms" and must be coded "to ensure that information about the case is not provided on the 1-800 number." App. 107a-08a.

As of May 29, 2002, there had been at least 611 individuals subjected to closed hearings. *See* Tamara Audi, *U.S. Held 600 For Secret Rulings*, Detroit Free Press, Jul. 18, 2002 (citing letter from Daniel Bryant, Assistant Attorney General, to Senator Carl Levin, Jul. 3, 2002). In many of these cases, the alien was unrepresented. Although the government has refused to provide comprehensive figures on the percentage of these hearings in which the alien was represented, even nine months removed from September 11, a full 25 percent of the special interest detainees were without counsel. *See* Def.'s Resp. to Order of May 31, 2002, in *Center for Nat'l Sec. Studies*, 215 F.Supp.2d 94 (D.D.C. 2002) (No. 01-2500) (appeal pending), *supra* note 1.[2]

3. The government submitted two declarations from law enforcement officials setting forth the justifications for the Creppy directive. As described by the court of appeals (App. 39a-42a), those declarations state that the closure policy serves two goals. One is to safeguard the detainees' "privacy interest in having their possible connection to the ongoing investigation kept undisclosed." App. 42a. It is undisputed, however, that the directive mandates the automatic closure of cases even where the detainee specifically requests an open hearing. *See Detroit Free Press v.*

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[2] It seems probable that a greater number of aliens were unrepresented at earlier periods because of the reported obstacles hindering detainees from securing legal representation. *See* Human Rights Watch, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees, 41-45 (Aug. 2002), http://www.hrw.org/reports/2002/us911/USA0802.pdf; Tamar Lewin, *For Many of Those Held in a Legal Tangle, Little is Revealed*, N.Y. Times, Nov. 1, 2001, at B5.

Ashcroft, 195 F. Supp. 2d 937, 941 (E.D. Mich. 2002) (noting that detainee subject to closure policy was seeking open hearing); *aff'd*, 303 F.3d 681.

The other purpose offered for the categorical closure policy relates to the government's terrorism investigation. More particularly, the government's declarations allege that open hearings "will reveal sources and methods of investigation;" "would . . . reveal[ ] what information the United States *may not* possess about a particular detainee;" "could allow terrorist organizations to map the progress of the investigation;" "may cause terrorists, who learn that their associates or even people who know their associates have been detained to alter their plans in a way that presents an even greater threat to the United States;" "could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence;" "would reveal other investigative sources and potential witnesses for other pending cases;" and "may deter [special interest detainees] or others from cooperating with the Department of Justice once they are released from custody and impair their usefulness to the ongoing investigation." Declaration of Dale Watson, Third Cir. Jt. App., at 80-89, ¶¶12-18 ("Watson Decl.") (emphasis in original). The declarations further state that "[b]its and pieces of information that may appear innocuous in isolation can be fit into a bigger picture by terrorist groups." Watson Decl. ¶12.

Notwithstanding these asserted justifications, the Creppy directive allows no exception for cases where the information that would be disclosed at the hearing is *already* in the public domain. The directive mandates automatic closure even where, for example, the alien's identity and biographical information have been widely reported in the press; *see Detroit Free Press*, 303 F.3d at 707; Wayne Perry, *Detainees Try to Fight Secrecy*, Philadelphia Inquirer, Mar. 4, 2002 (identifying detainee).

In addition, the Creppy directive mandates closure of the *entire* deportation process, including those portions of the process that involve only scheduling matters or the presentation of routine testimony already publicly revealed. *See infra* note 6; *see also Detroit Free Press*, 195 F. Supp. 2d at 947.

The Creppy directive also imposes no restriction on what attorneys or the detainees themselves may disclose about "special interest" proceedings, or on the right of detainees to receive visitors and place calls from detention. Thus, the attorneys and detainees can disclose the testimony and evidence submitted at the hearing, and may even distribute documentary evidence. *See, e.g., Detroit Free Press*, 195 F. Supp. 2d at 947 (noting that detainee's name, date, and place of arrest were "made public from the outset"); *U.S. Judge Orders Charity's Founder Held Indefinitely*, Chicago Tribune, Jan. 3, 2002, at 8 (description of closed hearing by detainee's lawyer).

And notwithstanding that the government's asserted security interests would in theory apply equally to anyone arrested in connection with the September 11 investigation, the immigration detainees are the only ones whom the government has sought to try behind closed doors. Individuals who have been criminally charged with a terrorism-related offense have received open trials. *See, e.g., United States v. Moussaoui*, No. 01-455-A (E.D. Vir. 2002) (pending). Similarly, petitioners are not aware of a single closed trial in any case involving the 134 individuals whom the government has identified as having some connection to the September 11 investigation but who have been charged only with garden-variety criminal offenses. *See* Curt Anderson, *Most of Post-Sept. 11 Detainees Deported, Released or Guilty of Nonterror Offenses*, Associated Press, Dec. 11, 2002 (citing Justice Department figures). Yet the government's declarations do not draw any distinction – from the perspective of national security

– between this group of 134 criminal defendants and the special interest immigration detainees subject to the Creppy closure directive.[3]

In short, the Creppy directive prohibits the narrow tailoring of closure orders to the specific circumstances of a case and wholly relieves the Justice Department of making any particularized showing regarding the need for closure. Instead, the directive mandates the blanket closure of every minute of every special interest case, even where, for example, detainees request an open hearing, their identity is already in the public domain, and some or all of the testimony to be offered at a given hearing has previously been disclosed in the press.

C. Proceedings Below.

The petitioners in this case are the North Jersey Media Group, publisher of the *Herald News* and several other New Jersey newspapers, and the New Jersey Law Journal, a weekly newspaper covering law and public affairs. Both petitioners have regularly covered issues surrounding the events of September 11, including the significant immigration issues arising from the government's terrorism investigation. At various times after issuance of the Creppy directive, petitioners' reporters

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[3] In particular, the declarations do not claim that the immigration detainees were deemed to have a greater connection to terrorism or the September 11 investigation than were the 134 individuals who have been criminally charged. *See* Watson Decl. ¶¶6, 8; Declaration of James S. Reynolds, Third Circuit Jt. App., at 90-104, ¶¶4, 10, 27. In this regard, the Reynolds Declaration specifically states (at ¶27) that detainees charged with federal crimes were "[l]ike the INS detainees" in that "these individuals were originally apprehended by federal, state, or local law enforcement as a result of the federal investigation emanating from the September 11 attacks."

sought docket information about, or access to, deportation proceedings covered by the directive. In each instance they were denied information or access based solely on the directive, without a hearing or case-specific findings. App. 67a-68a (district court opinion) (recounting unsuccessful efforts).

1. On March 6, 2002, the newspapers filed this action in the District of New Jersey, seeking a preliminary and permanent injunction and a declaration that the Creppy directive was unlawful. App. 66a. The complaint raised two claims. The newspapers' principal claim was that under the reasoning of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny, the public and press have a First Amendment right to attend deportation proceedings and may be barred from attending such proceedings only upon case-specific findings demonstrating that closure is "necessitated by a compelling government interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Because the Creppy directive categorically closes proceedings without particularized findings, the newspapers argued that it violates the First Amendment. The newspapers' second claim was that the Creppy directive violates existing immigration regulations governing access to deportation proceedings for the same reason that the directive violates the First Amendment – the lack of case-specific findings. In particular, the newspapers argued that the language of the regulations (8 C.F.R. 3.27; 240.10(b)) contemplates closure only where the presiding immigration judge determines in "his or her discretion" that closure is warranted under the particular circumstances of the case.

2. On May 28, 2002, the district court preliminarily enjoined further enforcement of the Creppy directive on First Amendment grounds, but dismissed the newspapers' regulatory claim on the ground that the public had no

private right of action under the regulations. App. 91a-98a. The district court applied the First Amendment analysis set forth in *Richmond Newspapers* and found that the history of open deportation proceedings, coupled with the indispensable role that openness plays in the integrity and reliability of such proceedings, supports the existence of a right of access. App. 87a-89a. The court further concluded that the Creppy directive could not survive First Amendment scrutiny because it is not narrowly tailored to serve the government's interests. App. 90a-91a.

The district court did not dispute the importance of the government's two asserted interests (protection of the terrorism investigation and the detainees), but concluded that neither interest is sufficient to justify a *blanket* closure directive. The district court stressed that "to the extent that the Creppy Memo is said to serve the interest of insulating the individual detainee from humiliation or stigma, its mandates sweep too broadly because it does not permit the individual to elect such protective treatment" – treatment which the detainee may view "as having a negative impact upon them and their interests." App. 91a. The district court was also "not persuaded that the more narrow method of *in camera* disclosure of sensitive evidence . . . is not an acceptable means of avoiding a compromise of the government's investigation." App. 91a. The court further noted that although the Creppy directive seeks to prevent the disclosure of information that might potentially be helpful to terrorists, it does not "prevent disclosure of this very same information by the 'special interest' detainee or that individual's lawyer, both of whom are permitted to be present in the 'special interest' proceedings." App. 90a-91a. The court similarly observed that "if an appeal is taken, the transcript of the proceedings below would be disclosed in any event." App. 91a. The court thus concluded that the Creppy directive is "not narrowly tailored" and stressed that the government

remains free to seek appropriate closure orders in "specific individual cases." App. 97a.

3. On May 30, 2002, the government moved for a stay of the injunction pending appeal. The government also sought clarification that the injunction applied only within the District of New Jersey and only to the plaintiff newspapers, and to no other members of the press or public. On June 5, 2002, the district court issued an order denying the motions for a stay and for clarification, and made clear in an oral opinion from the bench on that same day that the injunction ran nationwide and was not limited to the plaintiffs. Order of June 5, 2002, Third Circuit Jt. App., at 43; Transcript of June 5, 2002 Proceedings, Third Circuit Jt. App., at 50.[4]

The government subsequently sought a stay from the Third Circuit, as well as an order expediting the appeal. On June 17, 2002, the court of appeals granted the government's motion for expedited consideration, but denied its request for a stay. App. 12a. On June 28, 2002, this Court granted, without opinion, the government's application for a stay pending disposition of the Third Circuit appeal. *Ashcroft v. North Jersey Media Group, Inc.*, 122 S.Ct. 2655 (2002).

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[4] The district court also noted at the June 5 stay hearing that a new regulation had been enacted on May 28, 2002 (the day the court issued its opinion on the merits), but concluded that, if anything, the new regulation supported its conclusion that the government had more targeted ways of furthering its interests. Transcript at 47-48. That regulation provides that the government may seek, on a case-by-case basis, to close the courtroom and obtain a protective order barring disclosure of potentially sensitive information. *See* 8 C.F.R. 3.27(d) (2003). The Third Circuit did not address the regulation.

4. On October 8, 2002, the Third Circuit reversed, with Judge Scirica dissenting. App. 1a-64a. The court of appeals held that there is no First Amendment right to attend the special interest deportation hearings covered by the Creppy directive, and consequently, that the government may categorically close such proceedings without any individualized demonstration that closure is warranted. App. 47a. Because the court found no First Amendment violation, it had no occasion to address the scope of the injunction; the opinion also did not address the newspapers' regulatory claim.

a. The government raised three basic arguments in the court of appeals. The government's principal contention was that the *Richmond Newspapers* line of cases has no applicability whatsoever to administrative proceedings and that there is thus no First Amendment right to attend *any* administrative hearing, regardless of the particular characteristics and traditions of a given administrative proceeding. In the alternative, the government argued that even if the *Richmond Newspapers* analysis applied, there is no First Amendment right to attend deportation proceedings because such hearings would not significantly benefit from openness and because deportation proceedings lacked a sufficiently strong tradition of access. Finally, the government argued that even assuming a right of access to deportation proceedings, the Creppy directive survives First Amendment scrutiny because it is the most narrowly tailored means of furthering the government's interests.

The court of appeals rejected the government's threshold submission that the *Richmond Newspapers* analysis applies only to judicial proceedings under Article III, and not to executive or legislative proceedings under Articles I and II, stating that circuit precedents "foreclose" (App. 19a) cabining the *Richmond Newspapers* analysis to judicial proceedings, and that even apart from circuit

precedent, the government's argument was based on a misreading of *Richmond Newspapers*. App. 19a-21a. The court of appeals then proceeded to apply what it said "has come to be known as the *Richmond Newspapers* 'experience and logic' test" (App. 15a) (citations omitted), in which courts look to whether the particular proceeding has traditionally been open and "whether public access plays a significant positive role in the functioning of the particular process in question." App. 15a (citation and internal quotation marks omitted). The court of appeals found that the newspapers failed to satisfy either prong of the test.

(i) Experience prong. The court of appeals noted that the governing statutes and regulations have specifically addressed the issue of access to immigration hearings since at least the 1890s, and observed that beginning in 1893 the statutes and regulations expressly closed exclusion hearings (for aliens seeking entry into the United States), but never similarly closed deportation hearings (for aliens already in the United States). App. 26a-28a. The court stated, however, that it was "unwilling effectively to craft a constitutional right from mere Congressional silence. . . ." App. 30a.

The court further noted that since 1964 the regulations have provided that deportation hearings generally shall be open to the public, subject to closure for specified reasons. App. 28a, 30a (citing regulations); *see* 8 C.F.R. 3.27 (hearings "shall be open"). But it dismissed the significance of these regulations by characterizing them as "recent" and "rebuttable." App. 30a. Finally, the court assumed that because some deportation proceedings have historically been held in prisons and other places where there is no general right of access, the proceedings themselves must have been generally closed to the public, and dismissed as irrelevant the possibility that family, friends, or other "select non-party individuals" might have been

allowed to attend hearings even in those restricted settings. App. 29a n.11.

(ii) Logic prong. The court of appeals also concluded that the newspapers had failed to satisfy the logic prong. Significantly, however, the court conceded that deportation proceedings "look very much like judicial trials" (App. 37a) and that in general "openness of deportation proceedings performs each of [the] salutary functions" served by open civil and criminal proceedings. App. 39a. But the court was "troubled" by its sense of how the logic inquiry is "currently" conducted under existing cases (App. 39a), and stated that, in its view, the logic prong must look not only at the positive effects of openness, but also at the "flip side – the extent to which openness impairs the public good." App. 39a. Rather than assessing the effect of openness in deportation proceedings generally, however, the court examined the positive and negative effects of openness only in the subset of cases unilaterally identified as "special interest" by the Justice Department. And as to that subset of cases, the court adopted the government's declarations wholesale in concluding that "it is doubtful" that openness is beneficial. App. 40a.

Because the court of appeals concluded that the newspapers lacked a First Amendment right of access, it had no occasion to determine whether the Creppy directive could satisfy the First Amendment's narrow tailoring requirement. Notably, however, the court stated that the government's declarations were "speculative," and acknowledged "the force" of the newspapers' contention that the declarations were "insufficient" to justify a blanket closure rule under First Amendment scrutiny. App. 43a n.14.

b. Judge Scirica dissented, concluding that the press and public have a First Amendment right to attend deportation proceedings and that the Creppy directive cannot

satisfy First Amendment scrutiny. App. 47a-48a. In particular, Judge Scirica concluded that the newspapers satisfied the experience prong of the *Richmond Newspapers* analysis in light of the century-long statutory and regulatory tradition of closing exclusion, but not deportation, proceedings. App. 48a-49a. He found this statutory and regulatory history particularly significant given the "nascent tradition of the administrative state" and the fact that the history dated back to when Congress "first enacted an immigration statutory framework." App. 53a; *id.* at 48a-49a (observing that Congress did not begin regulating immigration until "the end of the nineteenth century"). Judge Scirica also expressed strong disagreement with the majority's logic prong analysis. Citing this Court's decisions, and in particular *Globe Newspaper*, 457 U.S. at 605 n.13, he explained that:

> At this [logic prong] stage, we must consider the value of openness in deportation hearings generally, not its benefits and detriments in 'special interest' deportation hearings in particular. If a qualified right of access is found to attach to deportation hearings generally, the analysis *then* turns to whether particular issues raised in individual cases override the general limited right of access.

App. 55a. He stressed that the majority had thus erred in focusing specifically on special interest cases and stated that "[w]hether national security interests justify closure of individual deportation hearings is a question properly addressed in the next step's more particularized inquiry." App. 56a.

Judge Scirica then concluded that the Creppy directive failed First Amendment scrutiny because it closed proceedings categorically and thus was not the most narrowly tailored means of serving the government's admittedly compelling interest in combating terrorism.

App. 59a-62a. He stressed that although "[c]losure in some – or perhaps all – special interest cases may be necessary and appropriate" (App. 59a), he was unwilling to forgo traditional First Amendment procedures, stating that in his view the Justice Department's unwillingness to allow for case-specific findings was the pivotal concern: "[a]t issue is not whether some or all deportation hearings of special interest aliens should be closed, but who makes that determination." App. 47a. Accordingly, he would have invalidated the Creppy directive.[5]

6. On December 2, 2002, the full court of appeals narrowly denied the newspapers' rehearing petition in a 6-5 vote, with Judge Scirica voting to deny rehearing. App. 100a-01a. On December 3, 2002, the Third Circuit amended its rehearing order without material change. App. 102a-03a.

REASONS FOR GRANTING THE PETITION

The petition should be granted because there is a direct conflict on a question of far-reaching importance to the Nation. The court of appeals ruling, moreover, was incorrect under *Richmond Newspapers* and its progeny.

1. The Third Circuit's ruling in this case is squarely at odds with the Sixth Circuit's prior ruling in *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), *reh'g denied*, 2003 U.S. App. LEXIS 1278 (Jan. 22, 2003) – the only other case to address a First Amendment challenge to the Creppy closure directive. The conflict has been expressly acknowledged by both the Third Circuit and the government. *See* App. 5a ("we find ourselves in disagreement with the

[5] Judge Scirica also stated that he would have limited the injunction to the plaintiffs and to the District of New Jersey. App. 63a-64a.

Sixth Circuit"); Gov't Pet. for Reh'g in *Detroit Free Press*, 303 F.3d 681, at 1 (noting that the Third Circuit has rejected the Sixth Circuit's "holding and analysis").

In *Detroit Free Press*, 303 F.3d 681, a coalition of Detroit newspapers (along with Congressman John Conyers, Jr.) challenged the Creppy directive on First Amendment grounds, arguing that they had been unconstitutionally barred from attending various deportation hearings in the case of Rabih Haddad. As in this case, it was undisputed that the plaintiffs were barred from the hearings solely on account of the Creppy directive, that there had been no case-specific findings, and that the government had not made a particularized showing of need. The district court issued a preliminary injunction in favor of plaintiffs, *Detroit Free Press*, 195 F. Supp. 2d 937, and the Sixth Circuit affirmed, holding that the Creppy directive violated the First Amendment under the *Richmond Newspapers* line of cases. 303 F.3d at 683.

The Sixth Circuit reached three principal conclusions. It held, first, that the public and press have a First Amendment right to attend deportation proceedings, reasoning that "deportation proceedings historically have been open" (303 F.3d at 701), that openness "undoubtedly enhances the quality of deportation proceedings" (*id.* at 703), and that the "Government has not identified one persuasive reason why openness would play a negative role in the [deportation] process" as a general matter. *Id.* at 705. It next held that the public's right of access could be denied only upon "specific" findings (*id.* at 707) demonstrating that closure "'is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest,'" *id.* at 705 (quoting *Globe Newspaper*, 457 U.S. at 606-07). Finally, the Sixth Circuit held that the Creppy directive did not satisfy this standard, stating that although the "Government's ongoing anti-terrorism investigation certainly implicates a compelling interest,"

the directive is "neither narrowly tailored, nor does it require particularized findings." *Id.* In particular, the Sixth Circuit found that the Creppy directive is both "over-inclusive by categorically and completely closing all special interest hearings" without a specific showing of need, and "under-inclusive" (because it permits attorneys and detainees to disclose even "sensitive" information from the hearings). *Id.* at 710.[6]

The court of appeals' ruling in this case cannot be squared with the Sixth Circuit's decision in *Detroit Free Press*. In the Third Circuit, the Creppy directive is constitutional and deportation proceedings may be summarily and categorically closed whenever the government unilaterally deems a case to be of "special interest" to its terrorism investigation. In the Sixth Circuit, the Creppy directive is unconstitutional and the government may close deportation proceedings only if there are case-specific findings demonstrating that the denial is "necessitated by

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[6] Notably, after the district court enjoined the Creppy directive in the *Detroit Free Press* litigation, the government chose not to seek closure of the next hearing in Haddad's case, even though the government remained free to do so under the injunction. *See* David Shepardson, *Haddad Hearing Open to Public*, Detroit News, Jul. 10, 2002, at 1C. In addition, in response to the injunction, the government released the transcripts of previously-closed hearings, stating that, upon review, the transcripts were not in fact "extremely sensitive" and that their release would not cause "irreparable harm." *Statement of Associate Attorney General Jay Stephens Regarding the Sixth Circuit Decision in the Haddad Case*, Apr. 19, 2002, http://www.usdoj.gov/opa/pr/2002/April/ 02_ag_238.htm. Most recently, the government did not seek to close the overwhelming majority of Haddad's final deportation hearings and moved to close only a small portion of the hearings where allegedly sensitive material was at issue; the immigration judge agreed to that limited closure request and barred access only to that portion of the hearing. *See* Niraj Warikoo, *Muslim Leader Testifies He's No Threat, Should Be Granted Bond*, Detroit Free Press, Oct. 2, 2002.

a compelling governmental interest, and is narrowly tailored to serve that interest." *Detroit Free Press*, 303 F.3d at 705 (citation and internal quotation marks omitted). The Court should grant review to resolve the conflict.

2. Even apart from the conflict between the Third and Sixth Circuits, this case warrants the Court's attention because of its unquestionable importance to the country. As emphasized by both the majority and dissenting opinions below, this case involves extraordinarily important questions. The majority pointedly stated that "[t]he importance of this case has not escaped us" and stressed that the court was "acutely aware that the countervailing positions of the parties go to the heart of our institutions, our national values, and the republic itself." App. 45a. Judge Scirica's dissent likewise emphasized the enormity of the issues involved: "The stakes are high. Cherished traditions of openness have come up against the vital and compelling imperatives of national security." App. 62a.

The Sixth Circuit similarly observed that the Creppy directive raised issues of enormous significance to the Nation, emphasizing both the government's "compelling" interest in preventing terrorism and the gravity of allowing the Justice Department "to uproot people's lives, outside the public eye, and behind a closed door." *Detroit Free Press*, 303 F.3d at 683, 705; *id.* at 711 ("Without question, the events of September 11, 2001, left an indelible mark on our nation, but we as a people are united in the wake of the destruction to demonstrate to the world that we are a country deeply committed to preserving the rights and freedoms guaranteed by our democracy").[7]

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[7] The importance of the issue presented here is further reflected in the widespread public attention it has received. *See, e.g., Closed Doors*

(Continued on following page)

The Creppy directive has been broadly applied to exclude the press and public from attending the deportation proceedings of more than 600 individuals arrested after September 11. *See supra* Tamara Audi, *U.S. Held 600 for Secret Rulings*, Detroit Free Press, Jul. 18, 2002 (citing DOJ letter to Senator Levin). The press and public have an overwhelming interest in knowing how – and how fairly – its government uses the power of detention and deportation. That is especially true at this moment, when the government itself has expressly drawn a link between deportation proceedings and the war on terrorism, and has frequently cited the number of non-citizens it has detained as evidence of the investigation's progress. *See, e.g.*, Dan Eggen and Susan Schmidt, *Count of Released Detainees Is Hard to Pin Down*, Washington Post, Nov. 6, 2001, at A10.[8]

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and the Courts, Milwaukee Journal Sentinel, Oct. 11, 2002; *Deportation May Be Needed, But Keep Hearings Open*, Santa Fe New Mexican, Oct. 10, 2002; *Excess Secrecy: A Federal Appeals Court Rejects the Sweeping Closure of Terror-Related Deportation Hearings*, Newsday, Aug. 28, 2002; *Expose Ashcroft's Secrecy As a Threat to Democracy*, Atlanta Journal and Constitution, Sept. 12, 2002; *Justice Dies in the Dark*, Los Angeles Times, Apr. 3, 2002; *Keeping Quiet*, Washington Post, Oct. 9, 2002; *Mum's the Word*, Baltimore Sun, Oct. 11, 2002; *Open Immigration Courts: Secrecy Breeds Lack of Accountability*, Miami Herald, Jul. 8, 2002; *Open or Closed? A Conflict on Deportation in Daylight*, Pittsburgh Post-Gazette, Oct. 11, 2002; *Overuse of Secret Detentions Causes Courts to Balk*, USA Today, Apr. 29, 2002; *Public Deserves a Seat at Immigration Hearings*, The Tennessean, Aug. 29, 2002; *Rush to Secrecy*, Intelligencer Journal, Oct. 11, 2002; *Too Much Deference to Secrecy*, Chicago Tribune, Oct. 12, 2002; *Too Much Secrecy: Democracy Needs to Conduct Affairs in Open*, Dallas Morning News, Dec. 9, 2002; *Where Democracy Di s*, Des Moines Register, Aug. 28, 2002; *A Win for Open Trials*, New York Times, Aug. 28, 2002.

[8] As the district court in the *Detroit Free Press* case stated (195 F. Supp. 2d at 944):

> It is important for the public, particularly individuals who feel that they are being targeted ... to know that even during

(Continued on following page)

These proceedings determine whether individuals will be detained, often for months, separated from their families, and then deported from the United States, where they and their families may have lived for years. As this Court has repeatedly noted, an individual's liberty is at stake in a deportation hearing. *See, e.g., Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (noting that deportation "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom"); *see also I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). Yet the government nonetheless claims the power to hold these proceedings beyond public scrutiny, without providing any particularized showing that secrecy is necessary. That is a remarkable position given our Nation's understandable tradition of recoiling against secret proceedings where an individual's freedom is at issue. *See, e.g., In re Oliver*, 333 U.S. 257, 273 (1948) (finding Sixth Amendment inapplicable to criminal contempt proceedings, but holding that fundamental principles of fairness protected by due process forbid closed-door proceedings where an individual's liberty is at stake, recounting the country's "historic distrust of secret proceedings, [and] their inherent dangers to freedom").

The court of appeals ruling also raises critically important questions about the proper application of the

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these sensitive times the Government is adhering to immigration procedures and respecting individuals' rights. Openness is necessary for the public to maintain confidence in the value and soundness of the Government's actions, as secrecy only breeds suspicion as to why the Government is proceeding against . . . [certain] aliens. . . . And if in fact the Government determines that [an alien] is connected to terrorist activity or organizations, a decision made openly concerning his deportation may assure the public that justice has been done.

Richmond Newspapers test. Both the Third and Sixth Circuits agreed that the *Richmond Newspapers* line of cases provided the governing framework, *see* App. 12a-21a; *Detroit Free Press*, 303 F.3d at 694-95, but sharply divided on how to apply that analysis in the circumstances of this case. The Sixth Circuit held that the government's asserted interests in closing proceedings must be subjected to exacting scrutiny to determine whether closure is genuinely necessary, and that narrow tailoring requires case-by-case closure determinations. The Third Circuit, in contrast, considered the government's asserted interests in closure at the threshold stage in determining whether a First Amendment right exists at all to attend the proceedings closed by the Creppy directive. Consequently, the Third Circuit did not subject the government's asserted interests in closing proceedings to exacting scrutiny nor require narrow tailoring. This difference in approach produced dramatically different results and highlights the need for further clarification from this Court.

Additionally, and critically, the Creppy directive raises the question of whether access may be denied based on a categorical order from the Justice Department (the very entity bringing the deportation action). The newspapers are aware of no case that has ever held that the type of sweeping, blanket closure dictated by the Creppy directive can survive First Amendment scrutiny. *See, e.g., Globe Newspaper*, 457 U.S. at 606-10 (invalidating mandatory closure statute). Not only have the courts insisted on the case-by-case approach reaffirmed by the Sixth Circuit and by the district court in this case, but they have likewise insisted that closure occur only upon specific findings, repeatedly rejecting the notion that the government may unilaterally decide when to shut off public access. *See, e.g., In re Washington Post Co.*, 807 F.2d 383, 391-92 (4th Cir. 1986) (overturning closure order in espionage case, stressing that although judiciary must be deferential, it must

not "abdicate" its responsibility to ensure that closure orders are narrowly tailored).

3. Finally, the Third Circuit's decision was erroneous. In concluding that the newspapers had failed to satisfy the "logic and experience" test, the court of appeals misread *Richmond Newspapers* and its progeny.

a. *Logic Prong*. The Third Circuit held that the newspapers failed to satisfy the logic prong by assessing the positive and negative effects of openness not for deportation proceedings generally, but only for the particular subset of "special interest" cases covered by the Creppy directive, which the court determined would not benefit from openness. App. 37a-45a. That courts should consider the *net* effect of openness is an unremarkable proposition with which the newspapers readily agree; it plainly makes no sense to conclude that openness would be beneficial if, on balance, openness does more harm than good. Here, the Third Circuit did not dispute that open deportation hearings are generally beneficial, as the Sixth Circuit properly concluded. App. 39a. Where the court erred is by assessing the positive and negative effects of openness only in the subset of "special interest" deportation cases, rather than in deportation proceedings generally. App. 39a-45a. As the dissent explained (App. 54a-55a), the majority's subset approach improperly conflated the threshold question of whether openness is beneficial to the deportation process as a general matter with the constitutionally and analytically separate question of whether closure in particular cases is warranted.

Notably, the Third Circuit failed to cite a single case in support of its novel subset approach. As this Court has consistently explained, the purpose of the logic inquiry is to determine "whether public access plays a significant positive role in the functioning of the particular *process* in question," not whether openness serves a positive role in

particular cases. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (*Press-Enterprise II*) (citation omitted) (emphasis added). Thus, in *Richmond Newspapers*, 448 U.S. at 569, the Court did not ask whether openness would be beneficial for particular categories of cases; instead, it considered "the importance of openness to the proper functioning of a trial" as a general matter. Similarly, in *Press-Enterprise II*, 478 U.S. at 8, the Court asked whether openness is beneficial to the preliminary hearing "process" in general, not whether it was beneficial in the murder case there. Here, of course, the "process" is the deportation proceeding, and that process does not change depending on the issues raised in a particular case, any more than the criminal trial process changes depending upon the offense charged.

Indeed, as Judge Scirica noted (App. 54a-55a), this Court's decision in *Globe Newspaper*, 457 U.S. at 605 n.13, specifically rejected the Third Circuit's subset approach in the related context of applying the "experience" test. There, the Court invalidated a statute mandating the blanket closure of criminal trials during the testimony of minor victims of sex offenses, specifically rejecting Massachusetts' argument that the press had failed to satisfy the experience prong because there was a tradition of closure during such testimony. The Court stated that the right of access to criminal trials is based "on the recognition that as a *general matter* criminal trials have long been presumptively open" and that whether the right "can be restricted in the context of any particular criminal trial . . . depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction." *Id.* (emphasis added).

The flaw in the Third Circuit's analysis is readily apparent from its implications for criminal trials. The press and public may be excluded from portions of criminal trials based upon a particularized showing, but they

plainly have a First Amendment right generally to attend such proceedings. Yet, if the Third Circuit's approach were the law, courts would now be required first to weigh the benefits and risks in each type of case (national security, burglary, murder, "special interest," and so on) to determine whether a First Amendment right exists in the first place.

By shoehorning the government's national security concerns into the threshold question whether a First Amendment right of access exists at all, the Third Circuit failed to subject the closure directive to the First Amendment's narrow tailoring requirement. App. 43a n.14. But the very point of the *Richmond Newspapers* framework is to determine which proceedings should generally be open and then to subject the government's interests in closing particular cases to exacting scrutiny to determine whether closure is necessary. *See, e.g., Globe Newspaper*, 457 U.S. at 605 n.13.

b. *Experience Prong.* In recounting the history of access to deportation hearings, the court of appeals did not dispute that since 1964 the immigration regulations have provided that deportation hearings generally shall be open to the public (8 C.F.R. 240.10(b); 3.27), and that even prior to that time, dating back to the turn of the Twentieth Century, the governing statutes and regulations expressly closed exclusion hearings, but not deportation hearings. App. 26a-30a. The court's dismissal of this history was wrong for several reasons.

The court of appeals erred, for instance, in dismissing the post-1964 regulations on the ground that they created only a "rebuttable" tradition of access. App. 30a. Even in the criminal context, there is only a presumption of access that can always be rebutted upon a proper showing. Yet, the First Amendment requires that those proceedings

generally remain open to the press and public. *See Richmond Newspapers*, 448 U.S. at 580-81.

The court of appeals was also wrong to dismiss the pre-1964 history on the ground that "mere Congressional silence" is an insufficient basis on which to find a right of access. App. 30a. The negative inference created by the pre-1964 regulations and statutes can hardly be deemed "mere Congressional silence." Those provisions were amended no fewer than twenty times during the 70-year period leading up to the enactment of the 1964 regulations, and the provisions repeatedly and consistently closed exclusion proceedings, but never once categorically closed deportation proceedings.[9]

Most fundamentally, the Third Circuit's conclusion that the tradition of access to deportation proceedings is not sufficiently "strong" failed to measure that tradition in light of the *purpose* of the experience prong; indeed, the court of appeals provided *no* criteria by which to measure the sufficiency of an historical showing. As this Court's access decisions have stressed, courts must not rigidly consult history for history's own sake, but should examine history "because a tradition of accessibility implies the favorable judgment of experience." *Press-Enterprise II*, 478 U.S. at 8 (citations and internal quotation marks omitted);

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[9] The court of appeals noted that deportation proceedings may have often occurred in places "where there is no general right of access," and that "[e]ven in recent times" deportation hearings are frequently held in prisons. Yet the fact that hearings occur in such places does not thereby place them off limits to spectators. The Justice Department's own guidelines currently provide that deportation hearings in prison "are considered public and an inmate's family members, friends, the media, or the public are eligible to attend." Bureau of Prisons, Institutional Hearing Program, Program Statement 5111.01 §12(c) (Apr. 25, 1997).

Globe Newspaper, 457 U.S. at 605. The logic and experience prongs are thus "complementary" considerations, *Press-Enterprise II*, 478 U.S. at 8, with the former asking whether there are contemporary policy reasons in favor of openness, and the latter asking whether there is any historical evidence indicating that openness has proved incompatible with the process over time.

The government cannot seriously contend that the tradition of access to deportation proceedings is insufficient to judge whether openness has proved compatible with, and beneficial to, the process over time. The government's own actions speak volumes. The Attorney General has amended the access regulations at least eight times since 1964, yet has never changed the open deportation hearing practice. In fact, the regulations were amended in 1997 to open up all of the newly-denominated "removal" proceedings, including the formerly closed exclusion hearings, bringing them in line with deportation proceedings. 8 C.F.R. 240.10(b). And, as noted, the pre-1964 statutes and regulations were amended on at least twenty occasions without ever expressly calling for the general closure of deportation proceedings. Furthermore, in 1996, Congress mandated that deportation hearings involving "alien terrorists" conducted by a newly-created terrorist removal court "shall be open to the public," 8 U.S.C. 1534(a)(2); *see generally* 8 U.S.C. 1533 *et seq.* (providing that the court may adjudicate only cases in which alien has been *charged* with terrorism). Yet, here the government maintains that routine immigration hearings can and should be automatically closed where no charge of terrorism is involved, solely because the government has labeled the case "special interest." In short, this history clearly shows that open deportation proceedings have been

accorded the "favorable judgment of experience." *Press-Enterprise II*, 478 U.S. at 8 (citations and internal quotation marks omitted).[10]

Finally, as the newspapers argued below, the Creppy directive is inconsistent with the governing regulations (8 C.F.R. 3.27; 240.10(b)), which generally require open proceedings absent an individualized determination that closure is necessary, and provide no categorical exception for so-called "special interest" cases. The newspapers are entitled to raise this non-constitutional claim because the regulations are designed to protect their interests as well as those of immigration detainees. *See* 8 C.F.R. 3.27 (providing that "priority" be given "to the press over the general public" in cases of limited space).

* * *

The public has a critical need to know how its government is responding to the events of September 11, and more generally how the government enforces the Nation's immigration laws. The press concomitantly has a grave responsibility to provide the public with this information to ensure an "informed" electorate on issues of profound public concern. *Globe Newspaper*, 457 U.S. at 605; *Richmond Newspapers*, 448 U.S. at 573 (noting that the press functions "as surrogates for the public"). Among other things, individual liberty is at stake in the deportation process. For a just society determined to act within the rule of law, that alone makes deportation hearings virtually unique among non-criminal proceedings. In light of

[10] In addition to the history concerning deportation proceedings specifically, the Sixth Circuit noted that there are also common law analogies that provide a longer framework in which to assess Anglo-American traditions governing the coercive deprivation of liberty. *Detroit Free Press*, 303 F.3d at 702.

the events of September 11, the public's need for information about the deportation process is that much greater. If deportation hearings are to be conducted in secret, the First Amendment does not permit that decision to be made on the basis of categorical judgments rather than careful case-by-case determinations.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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February 28, 2003

APPENDIX A

308 F.3d 198

United States Court of Appeals,
Third Circuit.

NORTH JERSEY MEDIA GROUP, INC.;
New Jersey Law Journal
v.
John ASHCROFT, Attorney General of the
United States; Michael Creppy, Hon.
John Ashcroft, Attorney General of the United States
and Michael Creppy, Chief Immigration Judge of the
United States, Appellants

No. 02-2524.

Argued: Sept. 17, 2002.
Filed: Oct. 8, 2002.

Robert D. McCallum, Jr., Assistant Attorney General, Christopher J. Christie, United States Attorney, Gregory G. Katsas (Argued), Deputy Assistant Attorney General, Sharon Swingle, Robert M. Loeb, Attorneys, Appellate Staff, United States Department of Justice, Civil Division, Appellate Staff, Washington, DC, for Appellants.

Steven R. Shapiro, Lucas Guttentag, Lee Gelernt (Argued), American Civil Liberties Union Foundation, Immigrants' Rights Project, New York, NY, Lawrence S. Lustberg, Shavar D. Jeffries, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, NJ, Edward Barocas, American Civil Liberties Union of New Jersey Foundation, Newark, NJ, David Cole, Georgetown University Law Center, Washington, DC, Nancy Chang, Shayana D. Kadidal, Center for Constitutional Rights, New York, NY, for Appellees.

David A. Schulz, Clifford, Chance, Rogers & Wells, New York, NY, for Amicus-Appellees.

Before BECKER, Chief Judge, SCIRICA and GREENBERG, Circuit Judges.

OPINION OF THE COURT

BECKER, Chief Judge.

This civil action was brought in the District Court for the District of New Jersey by a consortium of media groups seeking access to "special interest" deportation hearings involving persons whom the Attorney General has determined might have connections to or knowledge of the September 11, 2001 terrorist attacks. This category was created by a directive issued by Michael Creppy, the Chief United States Immigration Judge, outlining additional security measures to be applied in this class of cases, including closing hearings to the public and the press. Named as defendants in the suit were Attorney General John Ashcroft and Chief Judge Creppy. The District Court found for the media plaintiffs and issued an order enjoining the Attorney General from denying access, from which he now appeals.

The District Court's order was accompanied by an opinion which provides the framework for this appeal, at the heart of which lay a number of conclusions. First, the Court held that the case was governed by the test developed in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), a murder case in which the trial judge had ordered that the courtroom be cleared of all persons except witnesses. In striking down the closure order, the Supreme Court noted an "unbroken, uncontradicted history" of public access to criminal trials in Anglo American law running from "before the Norman Conquest" to the present. It emphasized that it had not

found "a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." *Id.* at 565-73, 100 S.Ct. 2814. The Supreme Court held that the right of the press and public to attend criminal trials "is implicit in the guarantees of the First Amendment." *Id.* at 580, 100 S.Ct. 2814. While the Court acknowledged the State's argument that the Constitution nowhere explicitly guarantees the public's right to attend criminal trials, it nonetheless held the right implicit due to the fact that the Framers drafted the Constitution against a backdrop of popular access.

In its opinion in this case, the District Court rejected the Government's argument that administrative hearings in general, and deportation hearings in particular, are not subject to the *Richmond Newspapers* two-part "experience and logic" test because they are of a fundamentally different nature. Instead, the Court applied that test, which asks first whether a particular proceeding has a history of openness, and then whether openness plays a positive role in that proceeding. With respect to the experience inquiry, the District Court relied especially on a line of Third Circuit cases which has applied *Richmond Newspapers* to find access to a number of auxiliary criminal proceedings, as well as to civil cases. The Court also relied on two cases in which we applied *Richmond Newspapers* to determine whether access should be granted to administrative proceedings, although we concluded in each instance that there was no access. In short, the District Court reasoned that these cases supported application of *Richmond Newspapers,* and, applying *Richmond Newspapers,* found that there was a sufficient history of open deportation proceedings to satisfy the *Richmond Newspapers* experience test.

Turning to the logic prong, the District Court held that policy considerations strongly favored media access. Significantly, however, in evaluating the logic prong, the Court did not consider the policies militating against media access, including those identified in a declaration filed by Dale Watson, Counterterrorism Chief of the Federal Bureau of Investigation, which explained the danger of security breaches entailed in opening the hearings. In brief, the Watson Declaration represents that insight gleaned from open proceedings might alert vigilant terrorists to the United States' investigative tactics and could easily betray what knowledge the government does – or does not – possess. Watson submits that even details that seem innocuous in isolation, such as the names of those detained, might be pieced together by knowledgeable persons within the terrorist network, who could in turn shift activities to a yet-undiscovered terrorist cell. Because immigration judges cannot be expected accurately to assess the harm that might result from disclosing seemingly trivial facts, Watson explains, seeking closure on a case-by-case basis would ineffectively protect the nation's interests.

Although existing caselaw on the logic prong has discussed only the policies favoring openness, we are satisfied that the logic prong must consider the flip side of the coin. Indeed, the Supreme Court seems to have contemplated this, for in formulating the *Richmond Newspapers* test it asked "whether public access plays a significant *positive* role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (emphasis added). Any inquiry into whether a role is positive must perforce consider whether it is potentially

harmful. The District Court, however, failed to consider the Watson Declaration under its logic inquiry, examining it only in conjunction with the Newspapers' argument that the Creppy Directive failed strict scrutiny, a position that it endorsed.

While we believe that the notion that *Richmond Newspapers* applies is open to debate as a theoretical matter, we must yield to the prior precedent of this Court, and hence will apply it to the facts. We note, however, that we are not bound by dicta in those decisions, including the most far reaching, *Whiteland Woods, L.P. v. Township of West Whiteland,* 193 F.3d 177 (3d Cir. 1999), which we discuss at length *infra.*

The only Circuit to deal with these issues has resolved them in favor of the media. *See Detroit Free Press v. Ashcroft,* 303 F.3d 681 (6th Cir. 2002). However, we find ourselves in disagreement with the Sixth Circuit. In our view the tradition of openness of deportation proceedings does not meet the standard required by *Richmond Newspapers,* or even its Third Circuit progeny. Deportation procedures have been codified for approximately 100 years but, despite their constant reenactment during that time, Congress has never explicitly guaranteed public access. Indeed, deportation cases involving abused alien children are mandatorily closed by statute, and hearings are often conducted in places generally inaccessible to the public. While INS regulations promulgated in 1964 create a *rebuttable* presumption of openness for most deportation cases, we conclude that a recently-created regulatory presumption of openness with significant statutory exceptions does not present the type of "unbroken, uncontradicted history" that *Richmond Newspapers* and its progeny require to establish a First Amendment right of access.

The most difficult case for the government is *FMC v. South Carolina State Ports Authority,* 535 U.S. 743, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002). In holding that state sovereign immunity bars an administrative agency from adjudicating a private party's complaint against a nonconsenting state, the Supreme Court recognized that "formalized administrative adjudications were all but unheard of" during the Framers' time. *Id.* at 1872. It nevertheless found that because Federal Maritime Commission adjudications so strongly resemble civil suits, they "are the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union," *id.,* and it concluded that state sovereign immunity applies.

We recognize that, at least since the 1960s, formalized deportation proceedings have borne an undeniable procedural resemblance to civil trials, and that, read broadly, *Ports Authority*'s language might therefore suggest that the same First Amendment rights exist in each context. While we find the issue debatable, as we explain more extensively *infra,* we believe that *Ports Authority*'s approach was inextricably tied to its underlying premise that sovereign immunity shields nonconsenting states from complaints brought by private persons, regardless of where private persons bring those complaints. In contrast, we find that there has never been a fundamental right of access to all government proceedings. Even today, many are closed by statute, including such frequent and important matters as Social Security hearings. Without a fundamental right of access comparable to nonconsenting states' right to freedom from private claims, we decline to loose *Ports Authority* from its Eleventh Amendment moorings.

We also disagree with the Sixth Circuit as to the import of the *Richmond Newspapers* logic prong. We note preliminarily that, in the jurisprudence developed thus far, the logic prong does not appear to do much work in the *Richmond Newspapers* approach, for we have not found a case in which a proceeding passed the experience test through its history of openness yet failed the logic test by not serving community values. Under the reported cases, the second prong of the *Richmond Newspapers* test has been applied to inquire whether openness plays a positive policy role in a given proceeding. But, as we have explained, that calculus perforce must take account of the flip side – the extent to which openness impairs the public good.

This case arises in the wake of September 11, 2001, a day on which American life changed drastically and dramatically. The era that dawned on September 11th, and the war against terrorism that has pervaded the sinews of our national life since that day, are reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches. Since the primary national policy must be self-preservation, it seems elementary that, to the extent open deportation hearings might impair national security, that security is implicated in the logic test. When it is factored in, given due consideration to the attorney general's statements of the threat, we do not believe that the *Richmond Newspapers* logic prong test favors the media either.

As we will now explain in detail, we find that the application of the *Richmond Newspapers* experience and logic tests does not compel us to declare the Creppy Directive unconstitutional. We will therefore reverse the Order of the District Court.

I. BACKGROUND

A. The Creppy Directive

Shortly after the attacks of September 11, 2001, the President ordered a worldwide investigation into those atrocities and related terrorist threats to the United States. Over the course of this ongoing investigation, the government has become aware of numerous aliens who are subject to removal from the United States for violating immigration laws. The Immigration and Naturalization Service has detained and initiated removal proceedings against many of these individuals.

The Department of Justice, which oversees the INS, has identified some aliens whose situations are particularly sensitive and designated their hearings "special interest" cases. According to Dale L. Watson, the FBI's Executive Assistant Director for Counterterrorism and Counterintelligence, the designated aliens "might have connections with, or possess information pertaining to, terrorist activities against the United States." (Watson Dec.) For example, special interest cases include aliens who had close associations with the September 11 hijackers or who themselves have associated with al Qaeda or related terrorist groups.

The Department of Justice has reviewed these designations periodically and removed them in many cases that it determined were less sensitive than previously believed. For those cases that retain the "special interest" designation, however, Chief Immigration Judge Creppy issued a memorandum (the "Creppy Directive") implementing

heightened security measures.[1] The Directive requires immigration judges "to close the hearing[s] to the public, and to avoid discussing the case[s] or otherwise disclosing any information about the case[s] to anyone outside the Immigration Court." It further instructs that "[t]he courtroom must be closed for these cases – no visitors, no family, and no press," and explains that the restriction even "includes confirming or denying whether such a case is on the docket or scheduled for a hearing." In short, the Directive contemplates a complete information blackout along both substantive and procedural dimensions.

In closing special interest deportation hearings, the Government's stated purpose is to avoid disclosing potentially sensitive information to those who may pose an ongoing security threat to the United States and its interests. The Government represents that "if evidence is

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[1] The Immigration and Nationality Act charges the Attorney General with the "administration and enforcement" of "all [ ] laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a) (1994). The Act authorizes the Attorney General to remove aliens from the United States for various reasons, including violation of the immigration laws. *Id.* at § 1231. It also permits him to prescribe "such regulations . . . as he deems necessary for carrying out his authority," *id.* at § 1103(a)(3), and provides for removal proceedings to be conducted by immigration judges within the Executive Branch "under regulations prescribed by the Attorney General." *Id.*

Pursuant to this authority, the Attorney General in 1964 promulgated a regulation governing public access to removal and other administrative hearings that has remained substantially unchanged. It mandates the closure of certain hearings, such as those involving abused alien children, and permits the closure of all other hearings to protect "witnesses, parties, or the public interest." 8 C.F.R. § 3.27 (2002) (modern codification). The Creppy Directive was issued pursuant to this regulation.

offered about a particular phone number link between a detainee and a number connected to a terrorist organization or member," the terrorists "will be on notice that the United States is now aware of the link" and "may even be able to determine what sources and methods the United States used to become aware of that link." (Watson Declaration.) Equally important, however, is "information that might appear innocuous in isolation [but that] can be fit into a bigger picture by terrorist groups in order to thwart the Government's efforts to investigate and prevent terrorism." (*Id.*) For example, information about how and why special interest aliens were detained "would allow the terrorist organizations to discern patterns and methods of investigation"; information about how such aliens entered the country "would allow the terrorist organization to see patterns of entry, what works and what doesn't"; and information "about what evidence the United States has against members of a particular cell collectively" would reveal to the terrorist organization which of its cells have been significantly compromised. (*Id.*)

The Government offers a litany of harms that might flow from open hearings. Most obviously, terrorist organizations could alter future attack plans, or devise new, easier ways to enter the country through channels they learn are relatively unguarded by the Department of Justice. They might also obstruct or disrupt pending proceedings by destroying evidence, threatening potential witnesses, or targeting the hearings themselves. Finally, if the government cannot guarantee a closed hearing, aliens might be deterred from cooperating with the ongoing investigation. *See infra.*

B. Present Litigation

From November 2001 to February 2002, reporters for the New Jersey Law Journal and Herald News ("the Newspapers") were repeatedly denied docket information for and access to deportation proceedings in Newark's Immigration Court. On March 6, 2002, the Newspapers filed a federal court challenge to the Creppy Directive, asserting that its mandated policy of closing every "special interest" case precluded the case-by-case treatment the First Amendment requires. They argued not only that individualized inquiries are proper and practical, but also that because the Directive permits special interest detainees themselves to disseminate information concerning their proceedings, its veil of secrecy is ineffective at best.[2]

The District Court applied the two-part First Amendment analysis set forth in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 555, 100 S.Ct. 2814, and found that since the promulgation of the modern immigration regulations, *see* 8 C.F.R. § 242.16(a) (1964), there has been a "presumption of openness for deportation proceedings," or at a minimum, there has been "no tradition of their presumptive closure." *North Jersey Media Group, Inc. v. Ashcroft,* 205 F.Supp.2d 288, 300 (May 28, 2002). It held that this history of presumed openness, coupled with the

[2] Although the Creppy Directive did not itself prohibit aliens and their counsel from themselves disclosing information about special interest hearings, a recently promulgated regulation authorizes immigration judges to issue protective orders and seal records as necessary to protect sensitive "law enforcement or national security information." *See* 67 Fed. Reg. 36799, 36799 (May 28, 2002). As this regulation took effect on the day the District Court rendered its decision, it played no role in that opinion.

"abundant similarities" between deportation proceedings and judicial proceedings in the criminal and civil contexts, supported the existence of a First Amendment right of access. *Id.* at 301. It further held that because the Creppy Directive's closures were categorical rather than narrowly-tailored, it failed strict scrutiny. The District Court accordingly granted the Newspapers' motion and temporarily enjoined the Directive's operation, although it left open the possibility of seeking closure in individual cases.

In a subsequent order, the District Court denied the Government's motion for a stay pending appeal, and it clarified that its injunction has nationwide scope, applies to all proceedings regardless of whether plaintiffs seek to attend, and requires proceedings to be open to all members of the press and public. (Proceeding of June 5, 2002.) On June 17, 2002, this Court granted expedited review of the Government's appeal but denied a stay. A week later, however, the Supreme Court granted a stay of the District Court's injunction pending the final disposition of this appeal. We note jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1292(a)(1), and exercise plenary review over the District Court's legal conclusion that the First Amendment guarantees a right of access to deportation proceedings. *See Rose Art Indus., Inc. v. Swanson,* 235 F.3d 165 (3d Cir.2000).

II. APPLICABILITY OF *RICHMOND NEWSPAPERS*

In finding a First Amendment right of access to deportation hearings, the District Court employed the two-part test set forth in *Richmond Newspapers* and its progeny. The Government contends that the *Richmond Newspapers* test, developed as it was for criminal trials, has no

proper application outside the judicial realm. It argues in the alternative that even if *Richmond Newspapers* provides the appropriate analytical framework, deportation proceedings cannot run its "experience and logic" gauntlet.

While we agree with the District Court's conclusion that *Richmond Newspapers* analysis is proper in the administrative context, we disagree with its application and hold that under that test, there is no First Amendment right to attend deportation proceedings.

A. Applicability to Article III Proceedings

In *Richmond Newspapers,* 448 U.S. at 555, 100 S.Ct. 2814, the Supreme Court held that the press and public possess a First Amendment right to attend criminal trials. In that seminal case, the police arrested a man and tried him for murder. During his fourth trial (the first had been reversed on appeal, and the second and third were declared mistrials), the defendant's counsel moved that it be closed to the public so as to avoid yet another instance of jury contamination. The prosecutor had no objection, so the judge ordered "that the Courtroom be kept clear of all parties except the witnesses when they testify." *Id.* at 560, 100 S.Ct. 2814. Two newspaper reporters sought to vacate the closure order on First Amendment grounds, arguing that the court had made no evidentiary findings prior to issuing its order and also had failed to consider other, less drastic measures within its power to ensure a fair trial.

The Supreme Court held that as "[t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open," *id.* at 575, 100 S.Ct. 2814, the right of the press and public to attend criminal

trials "is implicit in the guarantees of the First Amendment." *Id.* at 580, 100 S.Ct. 2814. It therefore struck down the closure order. Critical to the Court's holding was evidence of an "unbroken, uncontradicted history" of public access to criminal trials in Anglo American law running from "before the Norman Conquest" to the present, and it emphasized that it had not found "a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." *Id.* at 565-73, 100 S.Ct. 2814.

The Court also explained that this tradition of openness was no "quirk of history"; rather, it had long been recognized as an indispensable attribute of the trial process. *Id.* at 569, 100 S.Ct. 2814. The open trial "gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Id.* Equally important was its prophylactic effect, which discouraged vigilantism by "providing an outlet for community concern, hostility, and emotion." *Id.* at 571, 100 S.Ct. 2814.

The *Richmond Newspapers* First Amendment right of access to criminal trials, therefore, stemmed from an "uncontradicted history, supported by reasons as valid today as in centuries past." *Id.* at 573, 100 S.Ct. 2814. In his pragmatic concurrence, Justice Brennan concluded that:

> [T]wo helpful principles may be sketched. First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. Such a tradition commands respect in part because the Constitution carries the gloss of

> history. More importantly, a tradition of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.

Id. at 589, 100 S.Ct. 2814.

Despite Justice O'Connor's admonition that *Richmond Newspapers* does not have "any implications outside the context of criminal trials," *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 611, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), a majority of the Court has since adopted Justice Brennan's language as a test of at least somewhat broader application. In *Press-Enterprise Co. v. Superior Court,* 478 U.S. at 1, 106 S.Ct. 2735 (*Press-Enterprise II),* the Court held that there is a First Amendment right of access to preliminary hearings. *Id.* at 13, 106 S.Ct. 2735. In so doing, it formalized what has come to be known as the *Richmond Newspapers* "experience and logic" test:

> First, because a tradition of accessibility implies the favorable judgment of experience, we have considered whether the place and process have historically been open to the press and general public. . . . Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question.

Id. at 8, 106 S.Ct. 2735 (citations omitted). The Court recognized that "[t]hese considerations of experience and logic are, of course, related, for history and experience

shape the functioning of governmental processes." *Id.* at 9, 106 S.Ct. 2735. Nevertheless, it made clear that relation is not tantamount to equivalence, and it independently applied both prongs of the test to preliminary proceedings.

The Court first noted that, like criminal trials, pretrial proceedings had long been "conducted before neutral and detached magistrates [and had] been open to the public." *Id.* at 10, 106 S.Ct. 2735. Indeed, during Aaron Burr's trial for treason in 1807, Chief Justice Marshall conducted a probable-cause hearing in the Hall of the House of Delegates in Virginia, the courtroom being too small to accommodate the throng of interested citizens. *Id.* Although several states had allowed preliminary hearings to be closed on the motion of the accused, even in these states they had been presumptively open and were closed only for cause shown. *See id.* at n. 3, 106 S.Ct. 2735. The Court therefore concluded that open preliminary hearings had been accorded the favorable judgment of experience. *Id.* at 11, 106 S.Ct. 2735 (citation omitted). It then asked whether public access played a "particularly significant positive role" in pretrial proceedings, and found in the affirmative. "Because of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding." *Id.* at 12, 106 S.Ct. 2735. In fact, in many cases the preliminary hearing provides "the sole occasion for public observation of the criminal justice system," and the absence of a jury "makes the importance of public access . . . even more significant." *Id.* at 12-13, 106 S.Ct. 2735. Because preliminary hearings passed both parts of the *Richmond Newspapers* test, the Court found that the public has a First Amendment right of access in that context. It had reached the same conclusion regarding *voir dire* examinations in *Press-Enterprise Co. v. Superior*

Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*).

Given that a majority of the Supreme Court has applied the *Richmond Newspapers* framework to pretrial proceedings and *voir dire* examinations, that approach clearly is not confined to the criminal trial itself, although each of the Supreme Court's applications has arisen in the criminal context. This Court has been less reticent in its extensions. First, in *Publicker Industries, Inc. v. Cohen,* 733 F.2d 1059 (3d Cir. 1984), we applied *Richmond Newspapers* and held that the First Amendment implicitly incorporates a right of access to civil trials. Our conclusion rested on the finding that "the public's right of access to civil trials and records is as well established as that of criminal proceedings and records," *Id.* at 1066, and we noted that "[a]s early as 1685, Sir John Hawles commented that open proceedings were necessary so that truth may be discovered in civil as well as criminal matters." *Id.* at 1067 (citation omitted). We then found that, under the logic prong, openness has similar salutary effects in civil and criminal trials, and concluded that the same First Amendment right of access extends to each.[3] *Id.* at 1070.

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[3] Although the Supreme Court has not addressed the right to attend civil trials, each Court of Appeals to examine this question has concluded that *Richmond Newspapers* applies and that a First Amendment right exists. *See, e.g., Westmoreland v. CBS,* 752 F.2d 16, 23 (2d Cir. 1984); *Rushford v. New Yorker Magazine,* 846 F.2d 249 (4th Cir. 1988); *Brown & Williamson Tobacco Co. v. Federal Trade Commission,* 710 F.2d 1165 (6th Cir. 1983); *In re Continental Illinois Securities Litigation,* 732 F.2d 1302 (7th Cir. 1984); *Newman v. Graddick,* 696 F.2d 796 (11th Cir. 1983).

B. *Applicability of* Richmond Newspapers *to Administrative Proceedings*

The Government contends that while *Richmond Newspapers* properly applies to civil and criminal proceedings under Article III, the Constitution's text militates against extending First Amendment rights to non-Article III proceedings such as deportation. Its premise is one of *expressio unius est exclusio alterius:* Article III is silent on the question of public access to judicial trials, but the Sixth Amendment expressly incorporates the common law tradition of public trials, thus supporting the notion that the First Amendment likewise incorporates that tradition for Article III purposes. (Gov't Brief at 21-22.) Articles I and II, conversely, *do* address the question of access, and they *do not* provide for Executive or Legislative proceedings to be open to the public.[4] To the Government, the absence of an explicit guarantee of access for Article I and II proceedings (as exists in Article III) gives rise to a distinction with a difference because, without an incorporating provision parallel to the Sixth Amendment, the Framers must have intended to deny the public access to political proceedings.

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[4] The only constitutionalized access requirement vis-a-vis the Executive is that the President "from time to time give to the Congress Information of the State of the Union." (U.S. Const.Art. II, § 3.) The Constitution also requires Congress to publish a "regular Statement and Account of the Receipts and Expenditures of all public Money," (U.S. Const. art. I, § 9, cl. 7), and instructs each House of Congress to publish a journal of proceedings from which it may withhold "such Parts as it may in [its] Judgment require Secrecy." (U.S. Const. art. I, § 5, cl. 3).

The Government's suggestion is ultimately that we should not apply *Richmond Newspapers* where the Constitution's structure dictates that no First Amendment right applies, and should instead let the political branches (here, the Executive, acting through the Justice Department) determine the proper degree of access to administrative proceedings. *See Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1168 (3d Cir. 1986) (in banc) (concluding that aside from limited requirements, the Constitution leaves to the democratic process the regulation of public access to the political branches).

Our own jurisprudence precludes this approach. In *Publicker*, for example, we found a First Amendment right to attend civil trials, proceedings to which the Sixth Amendment is entirely inapplicable. If an express provision were necessary to incorporate into the Bill of Rights the common law tradition of access to trials, *Publicker* would have come out the other way, a result the Government does not urge. Moreover, the *Richmond Newspapers* Court itself apparently did not view the Sixth Amendment as a critical incorporating provision. That case's incorporation language states only that "[t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open." *Richmond Newspapers*, 448 U.S. at 575, 100 S.Ct. 2814. There is no suggestion that the Sixth Amendment is crucial to the right of access; indeed, this passage merely states that the Framers assumed a common and established practice.

At all events, after *Publicker*, the Sixth Amendment cannot be the sole source of a First Amendment right of access, and our precedents likewise foreclose the Government's attempt to confine the *Richmond Newspapers* approach to the Article III context. In *Capital Cities*

Media, 797 F.2d at 1164, we held that there was no First Amendment right of public access to the records of a state environmental agency, an administrative body. Although the Government makes much of our "no-access" conclusion, more important is our methodology, for we found no First Amendment right only after applying the *Richmond Newspapers* test. Reviewing the Supreme Court's relevant holdings, we summarized that "[t]he government may not close government proceedings which historically have been open unless public access contributes nothing of significant value to that process or there is a compelling state interest in closure and a carefully tailored resolution of the conflict between that interest and First Amendment concerns." *Id.* at 1173.

Similarly, in *First Amendment Coalition v. Judicial Inquiry & Review Board,* 784 F.2d 467 (3d Cir. 1986), we examined a Pennsylvania law permitting access to records of the Judicial Inquiry and Review Board only if that Board recommended disciplinary measures against a judge in a particular case. Plaintiff, a free speech advocacy group, sought access to records of cases in which the Board did not recommend a punishment. We again applied *Richmond Newspapers,* though we found that "[t]hese administrative proceedings, unlike conventional criminal and civil trials, do not have a long history of openness," *id.* at 472, and therefore upheld the state law against plaintiff's First Amendment right-of-access claim.[5] Most

[5] The Government submits that *First Amendment Coalition* actually stands for the opposite proposition: that we should not apply *Richmond Newspapers* to any administrative proceeding. It asserts that when we said "[t]hese administrative proceedings . . . do not have a long history of openness," our emphasis was on "proceedings." Such an

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recently, in *Whiteland Woods,* 193 F.3d at 177, we applied the *Richmond Newspapers* analysis to determine whether a citizen had a First Amendment right to videotape a Township Planning Commission meeting. As in *Capital Cities Media* and *First Amendment Coalition,* we denied the right but only after going through the two-step analysis. These precedents demonstrate that in this Court, *Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings, including removal. In this one respect we note our agreement with the Sixth Circuit's conclusion in their nearly identical case. *See Detroit Free Press v. Ashcroft,* 303 F.3d 681 (6th Cir. 2002). We now employ that test to determine whether the press and public have a First Amendment right to attend deportation hearings.

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emphasis would distinguish administrative *proceedings* from civil and criminal *trials,* and would imply that no administrative proceeding could make the historical showing necessary under *Richmond Newspapers.* But this interpretation is both incorrect and misplaced. It is incorrect because the prior sentence referred to the "fundamentally different procedures of judicial disciplinary boards," *id.,* so that when we said that "[t]hese administrative proceedings" lacked history, we clearly referred only to proceedings before judicial disciplinary boards and not to administrative proceedings generally. It is misplaced because even if the Government were correct that administrative proceedings generally lack history, that argument properly addresses the "experience" prong of the *Richmond Newspapers* test itself. Our immediate concern is the antecedent issue of whether to *apply* that test.

III. UNDER *RICHMOND NEWSPAPERS,* IS THERE A FIRST AMENDMENT RIGHT TO ATTEND DEPORTATION HEARINGS?

Richmond Newspapers requires that when a court assesses a claimed First Amendment right of access, it must "consider[ ] whether the place and process have historically been open to the press and general public . . . [and] whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II,* 478 U.S. at 8, 106 S.Ct. 2735. This language seems to place the burden of proof on the party alleging a First Amendment right. While we acknowledge a current presumption of openness in most deportation proceedings, we find that this presumption has neither the pedigree nor uniformity necessary to satisfy *Richmond Newspapers*'s first prong. We also conclude that under a logic inquiry properly acknowledging both community benefits *and* potential harms, public access does not serve a "significant positive role" in deportation hearings.

A. *The "Experience" Test*

1. Is there an historical right of access to government proceedings generally?

In *Richmond Newspapers,* 448 U.S. at 575, 100 S.Ct. 2814, the Supreme Court acknowledged the State's argument that the Constitution nowhere explicitly guarantees the public's right to attend criminal trials, but it found that right implicit because the Framers drafted the Constitution against a backdrop of longstanding popular access to criminal trials. Likewise, in *Publicker,* 733 F.2d at 1059, we found a First Amendment right of access to

civil trials because at common law, such access had been "beyond dispute."

The history of access to political branch proceedings is quite different. The Government correctly notes that the Framers themselves rejected any unqualified right of access to the political branches for, as we explained in *Capital Cities Media,* 797 F.2d at 1168-1171, the evidence on this point is extensive and compelling. We need not rescribe it here, but a few snippets are instructive. At the Virginia ratification convention, Patrick Henry was a leading opponent of government secrecy. He said of the publication clause: "[Congress] may carry on the most wicked and pernicious of schemes under the dark veil of secrecy. The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them." 3 *Elliot's Debates* at 169-70 (J. Elliot ed. 1881). Nevertheless, even Henry conceded that not all government activities should be publicized, particularly those related to "military operations or affairs of great consequence." *Id.* at 170. Thomas Jefferson agreed, noting that "[a]ll nations have found it necessary, that for the advantageous conduct of their affairs, some [executive] proceedings, at least, should remain known to their executive functionary only." Randall, 3 *Life of Thomas Jefferson* 211 (1858), *reprinted in* Wiggins, *Freedom or Secrecy* 67-68 (1964).

Congressional practice confirms that there is no general right of public access to governmental proceedings or information. The members of the First Congress did not open their own proceedings to the public – the Senate met

behind closed doors until 1794, and the House did likewise until after the War of 1812.[6] *See* Watkins, *Open Meetings under the Arkansas Freedom of Information Act,* 38 Ark. L.Rev. 268, 271 & n.96. While both Houses thereafter opened floor deliberations, committee sessions remained closed and were not routinely opened to the public until the mid-1970s. *Id.* at 272. Even today, the Senate operates under a resolution limiting public access to "routine Senate records" for 20 years after their creation and to "sensitive records, such as investigative files" for 50 years after their creation, and each Senate committee retains the right to extend that access period for its own records. S. Rep. 474, 96th Cong. 2nd Sess., 126 Cong. Rec. S15209-10 (daily ed., Dec. 1, 1980), U.S.Code Cong. & Admin.News 1996, p. 4659. *See generally Capital Cities Media,* 797 F.2d at 1170-71.

This tradition of closing sensitive proceedings extends to many hearings before administrative agencies. For example, although hearings on Social Security disability claims profoundly affect hundreds of thousands of people annually, and have great impact on expenditure of government funds, they are open only to "the parties and to other persons the administrative law judge considers necessary and proper." 20 C.F.R. § 404.944. Likewise, administrative disbarment hearings are often presumptively closed. *See, e.g.,* 12 C.F.R. § 19.199 (Office of Comptroller of Currency); 12 C.F.R. § 263.97 (Federal Reserve Board of Governors). The Government lists more than a

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[6] Indeed, it is interesting to note that our democracy was *created* behind closed doors, as the delegates at the Constitutional Convention in Philadelphia in 1787 excluded the public from their proceedings.

dozen other examples of mandatorily or presumptively closed administrative proceedings. For instance, hearings on charges of wrongdoing may often be closed at the administrator's discretion for "good cause," to protect the "public interest," or under similar standards. *See, e.g.,* 5 C.F.R. § 185.132(d) (Office of Personnel Management); 10 C.F.R. § 13.30(d) (Nuclear Regulatory Commission); 13 C.F.R. § 142.21(d) (Small Business Administration); 28 C.F.R. § 68.39(a) (Department of Justice); 31 C.F.R. § 500.713(a) (Office of Foreign Asset Control); 38 C.F.R. § 42.30(d) (Office of Veterans Affairs). Hearings on adverse passport decisions by the Department of State "shall be private." 22 C.F.R. § 51.87. *See also* 5 C.F.R. § 2638.505(e)(2) (hearings on ethics charges against government employees may be closed "in the best interests of national security, the respondent employee, a witness, the public or other affected persons"); 10 C.F.R. § 1003.62(a) (hearings before Department of Energy Office of Hearings and Appeals may be closed at discretion of administrator).

Faced with this litany of administrative hearings that are closed to the public, the Newspapers cannot claim a general First Amendment right of access to government proceedings without urging a judicially-imposed revolution in the administrative state. They wisely avoid that tactic, at least directly.[7] Instead they submit that, despite

[7] Although the Newspapers do not argue directly for a general right of access to government proceedings, they maintain that *FMC v. South Carolina Ports Authority,* 535 U.S. 743, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002), compels us to recognize the procedural similarities between civil trials and deportation hearings and extend the same access rights to each. We find that this contention turns, at least in

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frequent closures throughout the administrative realm, deportation proceedings in particular boast a history of openness sufficient to meet the *Richmond Newspapers* requirement. We now assess that claim, and find that we disagree.

2. Is the history of open deportation proceedings sufficient to satisfy the *Richmond Newspapers* "experience" prong?

For a First Amendment right of access to vest under *Richmond Newspapers,* we must consider whether "the place and process have historically been open to the press and general public," because such a "tradition of accessibility implies the favorable judgment of experience." *Press-Enterprise II,* 478 U.S. at 8, 106 S.Ct. 2735. Noting preliminarily that the question whether a proceeding has been "historically open" is only arguably an objective inquiry, we nonetheless find that based on both Supreme Court and Third Circuit precedents, the tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access.

The strongest historical evidence of open deportation proceedings is that since the 1890s, when Congress first codified deportation procedures, "[t]he governing statutes have always expressly closed *exclusion* hearings, but have

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part, on whether there is a fundamental right of access to government proceedings comparable to nonconsenting states' fundamental right to freedom from private suit. It is because we find no such comparable right that *FMC* does not bind us here. *See* discussion *infra*.

never closed deportation hearings."[8] (Newspapers' Br. at 30-31.) In 1893, the Executive promulgated the first set of immigration regulations, which expressly stated that exclusion proceedings shall be conducted "separate from the public." *See* Treasury Dept., *Immigration Laws and Regulations* 4 (Washington D.C., Gov't Printing Office 1893). Congress codified those regulations in 1903 and, since that time, it has repeatedly reenacted provisions closing exclusion hearings.[9] In contrast, although Congress

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[8] Although both exclusion and deportation hearings are now formally styled "removal" hearings, *see Chi Thon Ngo v. INS*, 192 F.3d 390, 394 & n. 4 (3d Cir. 1999), significant differences exist between the two. Exclusion proceedings occur when an applicant seeks entry into the United States, whereas in deportation proceedings, the United States seeks to expel a person who has already gained such entry. The Supreme Court has consistently held that persons facing deportation possess far greater legal rights than those contesting exclusion. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 73 S.Ct. 625, 97 L.Ed. 956 (1953) ("[While] it is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law, . . . [a]n alien on the threshold of initial entry stands on a different footing."). For clarity, we refer throughout this opinion to deportation and exclusion, rather than removal.

[9] *See, e.g.*, Act of March 3, 1903 § 25 (Ch. 1012, 32 Stat. 1213); Act of February 20, 1907 § 25 (Ch. 1134, 34 Stat. 898); 1952 Immigration and Nationality Act, 66 Stat. 163, §§ 236, 242 (same); Treasury Department, Immigration Laws and Regulations 3 (1893); Treasury Department, Immigration Laws and Regulations 3 (1895); Treasury Department, Immigration Laws and Regulations 3 (1898); Treasury Department, Immigration Laws and Regulations 3 (1900); Treasury Department, Immigration Laws and Regulations 3 (1902); Treasury Department, Immigration Laws and Regulations 3 (1903); Bureau of Immigration, Department of Commerce and Labor, Immigration Laws and Regulations 3, 9 (1904); Bureau of Immigration, Department of Commerce and Labor, Immigration Laws and Regulations 3 (1906); Bureau of Immigration and Naturalization, Department of Commerce and Labor, Immigration Laws and Regulations 34 (1907); Bureau of

(Continued on following page)

codified the regulations governing deportation proceedings in 1904 and has reenacted them many times since, it has never authorized the general closure that has long existed in the exclusion context.[10]

The Newspapers submit that under the rule of construction *expressio unius est exclusio alterius,* Congress's practice of closing exclusion proceedings while remaining silent on deportation proceedings creates a presumption that it intended deportation proceedings to be open. In support of this interpretation, they point out that the current Justice Department regulations provide explicitly that "[a]ll hearings, other than exclusion hearings, shall be open to the public except that . . . [f]or the purpose of protecting . . . the public interest, the

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Immigration, Department of Labor, Immigration Laws; Rules of May 1, 1917, 33 (1919); 8 C.F.R. pts. 12 & 19 (1938); 8 C.F.R. pt. 150 (1941 Supp.); 12 Fed.Reg. 5108 (July 30, 1947); 8 C.F.R. pt. 130 (1949); 32 Fed.Reg. 9628 (1967) codified at 8 C.F.R. pt. 236 (1968).

[10] *See, e.g.,* Act of March 3, 1903 § 25 (Ch. 1012, 32 Stat. 1213); Act of February 20, 1907 § 25 (Ch. 1134, 34 Stat. 898); Act of May 10, 1920 (Ch. 174, 41 Stat. 593); Act of May 26, 1924 (Ch. 190, 43 Stat. 153); 1952 Immigration and Nationality Act, 66 Stat. 163, § 242; Bureau of Immigration, Department of Commerce and Labor, Immigration Laws and Regulations 3, 9 (1904); Bureau of Immigration and Naturalization, Department of Commerce and Labor, Immigration Laws and Regulations 34 (1907); Bureau of Immigration, Department of Labor, Immigration laws; Rules of May 1, 1917, 33 (1919); 8 C.F.R. pt. 19 (1938); 8 C.F.R. pt. 150 (1941 Supp.); 9 Fed.Reg. 11884 (Sept. 19, 1944) (amendment to INS regulations governing deportation hearings, codified at 8 C.F.R. pt. 150 (1944 Supp.)); 10 Fed.Reg. 8096 (Aug. 1, 1945) (codified at 8 C.F.R. pt. 150 (1945 Supp)); 12 Fed.Reg. 5114 (July 30, 1947) (codified at 8 C.F.R. pt. 150 (1947 Supp.)); 8 C.F.R. pt. 150 (1949); 17 Fed.Reg. 11512 (Dec. 19, 1952) (codified at 8 C.F.R. pt. 242 (1952)); 22 Fed.Reg. 9795 (Dec. 6, 1957) (codified at 8 C.F.R. pt. 242 (1958)); 22 Fed.Reg. 9519 (Nov. 28, 1957) (codified at 8 C.F.R. pt. 242 (1958)).

Immigration Judge may limit attendance or hold a closed hearing." 8 C.F.R. § 3.27. From this they conclude that the regulations state explicitly what the statutes had long said implicitly, namely that deportation hearings are to be open unless an individualized case is made for closure.

But there is also evidence that, in practice, deportation hearings have frequently been closed to the general public. From the early 1900s, the government has often conducted deportation hearings in prisons, hospitals, or private homes, places where there is no general right of public access.[11] Even in recent times, the government has continued to hold thousands of deportation hearings each year in federal and state prisons. *See* H.R.Rep. No. 104-469, pt. I, at 124 (1996). Moreover, hearings involving abused alien children are closed by regulation no matter where they are held, and those involving abused alien spouses are closed presumptively. *See* 8 C.F.R. § 3.27(c).

We ultimately do not believe that deportation hearings boast a tradition of openness sufficient to satisfy *Richmond Newspapers*. In *Richmond Newspapers* itself, the Court noted an "unbroken, uncontradicted history" of

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[11] The Newspapers contend that there is no evidence that hearings conducted in hospitals, prisons, and private homes were closed to the public. The Sixth Circuit agreed, concluding that this evidence does not "even hint that the public could not attend a hearing [in these places]. . . . Certainly, one could imagine family and friends being present." *Detroit Free Press*, 303 F.3d 681 at 703. While we agree it is possible that some select non-party individuals might have been present in such places, we are unwilling to assume that the general public enjoyed unfettered access, a clearly counter-intuitive suggestion, particularly since *Richmond Newspapers*, in asking whether "the place and process have historically been open," seems to place the burden of proof on the party claiming openness.

public access to criminal trials in Anglo American law running from "before the Norman Conquest" to the present, and it emphasized that it had not found "a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." 448 U.S. at 565, 572, 573 & n. 9, 100 S.Ct. 2814. Likewise, in *Publicker,* 733 F.2d at 1059, we found that access to civil trials at common law was "beyond dispute."

The tradition of open deportation hearings is simply not comparable. While the *expressio unius* distinction between exclusion and deportation proceedings is a tempting road to travel, we are unwilling effectively to craft a constitutional right from mere Congressional silence, especially when faced with evidence that some deportation proceedings were, and are, explicitly closed to the public or conducted in places unlikely to allow general public access. Although the 1964 Department of Justice regulations did create a presumption of openness, a recent – and rebuttable – regulatory presumption is hardly the stuff of which Constitutional rights are forged.

The Newspapers contend, quite correctly, that at least within the geographic confines of the Third Circuit, a showing of openness at common law is not required. *See, e.g., United States v. Criden,* 675 F.2d 550, 555 (3d Cir. 1982) (finding a right of access to pretrial hearings even though no right existed at common law); *United States v. Simone,* 14 F.3d 833, 838 (3d Cir. 1994) (finding a right although no history predated 1980); *Whiteland Woods,* 193 F.3d at 181, (finding a "tradition of accessibility" based on a recent statutory guarantee). We agree that under these decisions a 1000-year history is unnecessary, and that in some cases, largely limited to the criminal context, relatively little history is required. These cases do

not, however, allow us to dispense with the *Richmond Newspapers* "experience" requirement where history is ambiguous or lacking, and to recognize a First Amendment right based solely on the "logic" inquiry.

In *Criden,* 675 F.2d at 552, the defendant requested that the court conduct *in camera* his pretrial motion to suppress evidence, and the court acquiesced. A reporter filed suit alleging a First Amendment right to view those proceedings. As *Criden* arose before *Press-Enterprise II* formalized the *Richmond Newspapers* test, we were not bound to apply it, and we stated that:

> We do not think that historical analysis is relevant in determining whether there is a first amendment right of access to pretrial criminal proceedings. We recognize that, at common law, the public apparently had no right to attend pretrial criminal proceedings. On the other hand, there was no counterpart at common law to the modern suppression hearing. . . . [W]e proceed to examine the current role of the first amendment and the societal interests in open pretrial criminal proceedings.

675 F.2d at 555. Although this language supports the Newspapers' contention that we have overlooked the experience requirement in certain cases, it does not bind us here. *Criden* arose in the criminal context, where First Amendment rights of access had been found many times previously. More importantly, in *Criden* we were not bound to apply the *Richmond Newspapers* test because in *Richmond Newspapers* itself, no approach commanded a majority, and the Court had not yet decided *Press-Enterprise II.* We are now obligated to apply that test, and we have recognized that "the role of history in the access

determination" is "crucial." *Capital Cities Media,* 797 F.2d at 1174.

The Newspapers' reliance on our decision in *Simone,* 14 F.3d at 833, is similarly misplaced. The District Court believed that *Simone* allows us to find a First Amendment right based solely on the logic prong where there is "neither a clear history of openness nor one of closure," *North Jersey Media,* 205 F.Supp.2d at 300, but this greatly overstates our holding. In assessing whether there is a right of access to post-trial examinations of jury misconduct, we noted that the only available evidence postdated 1980. We recognized that evidence "of such recent vintage [does] not establish a tradition of closure," *Simone,* 14 F.3d at 838, and concluded that "the 'experience' prong of the 'logic and experience' test provides little guidance." *Id.* We then found a right while focusing mainly on the logic prong, but critical to that giant step was our reflection that "*[g]iven the overwhelming historical support for access in other phases of the criminal process,* we are reluctant to presume that the opposite rule applies in this case in the absence of a distinct tradition to the contrary." *Id.* (emphasis added). This logic effectively limits *Simone*'s scope to the criminal context, or at least to those areas with "overwhelming historical support for access." As discussed *supra,* the tradition of public access in the administrative realm is inconsistent at best, so we must rigorously apply both prongs of the *Richmond Newspapers* test.

Finally, despite our potentially misleading language in *Whiteland Woods,* 193 F.3d at 177, that case has no proper application here. Whiteland Woods, a real estate developer, was denied permission to videotape a Township Planning Commission meeting, and it sued for access. Although we recognized that "[t]he primary issue on

appeal is whether there is a federal constitutional right *to videotape* public meetings of a township planning commission," *id.* at 180 (emphasis added), we stated in passing that "[w]e have no hesitation in holding Whiteland Woods had a constitutional right of access to the Planning Commission meeting." *Id.* at 180-81. As the Planning Commission never actually denied Whiteland Woods the *access* guaranteed by state law, however, our broad statement was dicta and we do not follow it here.

Although we are confident that our precedents do not allow us to find a First Amendment right of access to deportation hearings absent strong historical evidence, the Supreme Court's recent ruling in *FMC v. South Carolina Ports Authority,* 535 U.S. at ___, 122 S.Ct. at 1864, gives us pause. In holding that state sovereign immunity bars an administrative agency from adjudicating a private party's complaint against a nonconsenting state, the Supreme Court recognized that "formalized administrative adjudications were all but unheard of" during the Framers' time. *Id.* at 1872. It nevertheless found that because Federal Maritime Commission adjudications "walk[ ], talk[ ], and squawk[ ] like a civil lawsuit," *id.* at 1873 (quoting the Court of Appeals decision), "they are the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union." *Id.* at 1872. The Court therefore concluded that state sovereign immunity applies to administrative proceedings.

Ports Authority had not been decided when the District Court heard this case, and the Newspapers now assert that it forces us to distinguish the procedures in deportation hearings from those in civil trials before finding that different rights exist in each context. Were

this suggestion correct, we would indeed be hard pressed to find meaningful differences between the two types of proceedings. A deportation proceeding is commenced with a "Notice to Appear," *see* 8 C.F.R. § 239.1, a document strongly resembling a civil complaint. In turn, a respondent may proffer affirmative defenses. *See Martinez-Montoya v. INS,* 904 F.2d 1018 (5th Cir. 1990). As in a civil trial, a respondent has the right to be represented by counsel of his choosing, *see* 8 C.F.R. § 240.3, and has the right to be present during his hearing. *See* 8 U.S.C. § 1229a(b)(4). He or she is also guaranteed an opportunity to cross-examine witnesses and present evidence on his or her behalf. *Id.* While slight differences exist regarding such minor matters as the admissibility of hearsay evidence, we agree that on a procedural level, deportation hearings and civil trials are practically indistinguishable.

Despite these undeniable similarities, however, we do not believe that the Supreme Court intended in *Ports Authority* to import the full panoply of constitutional rights to any administrative proceeding that resembles a civil trial. The Court's reasoning was based fundamentally on its enduring presumption "that the Constitution was not intended to 'raise up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Ports Authority,* 535 U.S. at ___, 122 S.Ct. at 1872 (quoting *Hans v. Louisiana,* 134 U.S. 1, 18, 10 S.Ct. 504, 33 L.Ed. 842 (1890)). Put slightly differently, the Court started from the premise that state sovereign immunity shields nonconsenting states from complaints brought by private persons, regardless of where private persons bring those complaints. It then concluded that since Federal Maritime Commission proceedings strongly resemble civil trials to which state

sovereign immunity applies, the Framers would have intended the same right to freedom from private suit to apply in each context.

In contrast, there is no fundamental right to attend government proceedings underpinning the Newspapers' alleged right to attend deportation proceedings. *See* discussion *supra*. This is not a situation where the Framers contemplated a perfectly transparent government, only to have deportation proceedings, which they did not foresee, jeopardize that intended scheme. This is also not a situation involving allegations that the government assigned to an administrative agency a function that courts historically performed in order to deprive the public of an access right it once possessed. And most importantly, this is not a situation that risks affront to states' "residual and inviolable sovereignty," *id.* at 1870 (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison)), *the* concern that motivated the *Ports Authority* Court. We therefore decline to loose the *Ports Authority* analysis from its Eleventh Amendment moorings. Instead of analogizing procedures, the proper approach is that developed in *Richmond Newspapers,* and as we have explained, under that test we find an insufficient tradition of openness to support the right.

3. Relaxing the *Richmond Newspapers* experience requirement would lead to perverse consequences.

As we have explained in detail *supra,* there is no fundamental right of access to administrative proceedings.

Any such access, therefore, must initially be granted as a matter of executive grace.[12] The Government contends that by relaxing the need for a "1000-year tradition of public access," (Gov't Br. at 35), we would permanently constitutionalize a right of access whenever an executive agency does not consistently bar all public access to a particular proceeding. We do not adopt this reasoning in its entirety, for as we have discussed *supra,* we have sometimes found a constitutional right of access to proceedings that did not exist at common law. *See, e.g., Simone,* 14 F.3d at 837-40 (finding a public access right to post-trial jury examinations).

Nevertheless, we agree with the Government that a rigorous experience test is necessary to preserve the "basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 544, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). Were we to adopt the Newspapers' view that we can recognize a First Amendment right based solely on the logic prong if there is no history of closure, we would effectively compel the Executive to close its proceedings to the public *ab initio* or risk creating a constitutional right

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[12] The Newspapers disagree, arguing that "the *constitutional* right of access under the First Amendment does not, and could not, turn on whether the legislature has chosen to supply that right." We believe this reasoning to be precisely backwards, for *Richmond Newspapers* requires a tradition of access before recognizing a constitutional right to that access. Given that order of events, there must perforce be a period of time during which access to a particular proceeding is not constitutionally compelled, although during that period the executive could, of course, grant access as a matter of grace.

of access that would preclude it from closing them in the future. Under such a system, reserved powers of closure would be meaningless. It seems possible that, ironically, such a system would result in less public access than one in which a constitutional right of access is more difficult to create.

At all events, we would find this outcome incredible in an area of traditional procedural flexibility, and we are unwilling to reach it when a reasonable alternative is present. By insisting on a strong tradition of public access in the *Richmond Newspapers* test, we preserve administrative flexibility and avoid constitutionalizing ambiguous, and potentially unconsidered, executive decisions.

IV. DOES THE *RICHMOND NEWSPAPERS* "LOGIC" PRONG, PROPERLY APPLIED, SUPPORT A RIGHT OF ACCESS?

Even if we could find a right of access under the *Richmond Newspapers* logic prong, absent a strong showing of openness under the experience prong, a proposition we do not embrace, we would find no such right here. The logic test compels us to consider "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II,* 478 U.S. at 8, 106 S.Ct. 2735. The District Court observed that "there are abundant similarities between these proceedings and judicial proceedings in the criminal and civil contexts," and concluded that "the same functional goals served by openness in the civil and criminal judicial contexts would be equally served in the context of deportation hearings." *North Jersey Media,* 205 F.Supp.2d at 301. As we have discussed *supra,* we agree that deportation proceedings look very much like judicial trials. As we will

now explain, however, we find that the logic inquiry has drifted from its intended role and that, properly conceived, it does not support openness in this case.

In *Press-Enterprise II,* the case that formalized the *Richmond Newspapers* test, the Court identified several reasons that openness plays a significant positive role in preliminary hearings. It recognized that "[b]ecause of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding," and in many cases it "provides the sole occasion for public observation of the criminal justice system." *Id.* at 12, 106 S.Ct. 2735 (citation omitted). Similarly, it found that "the absence of a jury, long recognized as an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge, makes the importance of public access to a preliminary hearing even more significant." *Id.* at 12-13, 106 S.Ct. 2735 (citations omitted). Summarizing that "[d]enying the transcript of a [ ] preliminary hearing would frustrate what we have characterized as the 'community therapeutic value' of openness," it concluded that a qualified First Amendment right of access attaches to preliminary hearings. *Id.* at 13, 106 S.Ct. 2735.

In subsequent cases, this Court has noted six values typically served by openness: "[1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the judicial process to public

scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of perjury." *Simone,* 14 F.3d at 839.

We agree with the District Court and the Sixth Circuit that openness in deportation hearings performs each of these salutary functions, but we are troubled by our sense that the logic inquiry, as currently conducted, does not do much work in the *Richmond Newspapers* test. We have not found a case in which a proceeding passed the experience test through its history of openness yet failed the logic test by not serving community values. Under the reported cases, whenever a court has found that openness serves community values, it has concluded that openness plays a "significant positive role" in that proceeding. But that cannot be the story's end, for to gauge accurately whether a role is positive, the calculus must perforce take account of the flip side – the extent to which openness impairs the public good. We note in this respect that, were the logic prong only to determine whether openness serves some good, it is difficult to conceive of a government proceeding to which the public would not have a First Amendment right of access. For example, public access to *any* government affair, even internal CIA deliberations, would "promote informed discussion" among the citizenry. It is unlikely the Supreme Court intended this result.

In this case the Government presented substantial evidence that open deportation hearings would threaten national security. Although the District Court discussed these concerns as part of its strict scrutiny analysis, they are equally applicable to the question whether openness,

on balance, serves a positive role in removal hearings.[13] We find that upon factoring them into the logic equation, it is doubtful that openness promotes the public good in this context.

The Government's security evidence is contained in the declaration of Dale Watson, the FBI's Executive Assistant Director for Counterterrorism and Counterintelligence. Watson presents a range of potential dangers, the most pressing of which we rescribe here.

First, public hearings would necessarily reveal sources and methods of investigation. That is information which, "when assimilated with other information the United States may or may not have in hand, allows a terrorist organization to build a picture of the investigation." (Watson Dec. at 4.) Even minor pieces of evidence that might appear innocuous to us would provide valuable clues to a person within the terrorist network, clues that may allow them to thwart the government's efforts to investigate and prevent future acts of violence. *Id.*

Second, "information about how any given individual entered the country (from where, when, and how) may not divulge significant information that would reveal sources

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[13] We recognize that, under our approach, there is an evidentiary overlap between the *Richmond Newspapers* logic prong and the subsequent "compelling government interest" strict scrutiny investigation necessary upon a finding of a First Amendment access right. Nonetheless, the inquiries are not redundant because it is possible for openness to serve a positive role under a balanced logic prong even though the government has a compelling interest in closure. This would simply require that the policy rationales supporting openness be even more compelling than those supporting closure.

and methods of investigation. However, putting entry information into the public realm regarding all 'special interest cases' would allow the terrorist organization to see patterns of entry, what works and what doesn't." *Id.* That information would allow it to tailor future entries to exploit weaknesses in the United States immigration system.

Third, "[i]nformation about what evidence the United States has against members of a particular cell collectively will inform the terrorist organization as to what cells to use and which not to use for further plots and attacks." *Id.* A related concern is that open hearings would reveal what evidence the government lacks. For example, the United States may disclose in a public hearing certain evidence it possesses about a member of a terrorist organization. If that detainee is actually involved in planning an attack, opening the hearing might allow the organization to know that the United States is not yet aware of the attack based on the evidence it presents at the open hearing. *Id.*

Fourth, if a terrorist organization discovers that a particular member is detained, or that information about a plot is known, it may accelerate the timing of a planned attack, thus reducing the amount of time the government has to detect and prevent it. If acceleration is impossible, it may still be able to shift the planned activity to a yet-undiscovered cell. *Id.* at 7.

Fifth, a public hearing involving evidence about terrorist links could allow terrorist organizations to interfere with the pending proceedings by creating false or misleading evidence. Even more likely, a terrorist might destroy existing evidence or make it more difficult to obtain, such as by threatening or tampering with potential

witnesses. Should potential informants not feel secure in coming forward, that would greatly impair the ongoing investigation. *Id.*

Sixth, INS detainees have a substantial privacy interest in having their possible connection to the ongoing investigation kept undisclosed. *Id.* at 8. "Although some particular detainees may choose to identify themselves, it is important to note that as to all INS detainees whose cases have been placed in the special interest category concerns remain about their connection to terrorism, and specifically to the worst attack ever committed on United States soil. Although they may eventually be found to have no connection to terrorist activity, discussion of the causes of their apprehension in open court would forever connect them to the September 11 attacks." *Id.* While this stigma concern exists to some extent in many criminal prosecutions, it is noteworthy that deportation hearings are regulatory, not punitive, *see Carlson v. Landon,* 342 U.S. 524, 537, 72 S.Ct. 525, 96 L.Ed. 547 (1952), and there is often no evidence of any criminal wrongdoing.

Finally, Watson represents that "the government cannot proceed to close hearings on a case-by-case basis, as the identification of certain cases for closure, and the introduction of evidence to support that closure, could itself expose critical information about which activities and patterns of behavior merit such closure." (Watson Dec. at 8-9.) Moreover, he explains, given judges' relative lack of expertise regarding national security and their inability to see the mosaic, we should not entrust to them the decision whether an isolated fact is sensitive enough to warrant closure.

The Newspapers are undoubtedly correct that the representations of the Watson Declaration are to some degree speculative, at least insofar as there is no concrete evidence that closed deportation hearings have prevented, or will prevent, terrorist attacks.[14] But the *Richmond Newspapers* logic prong is unavoidably speculative, for it is impossible to weigh objectively, for example, the community benefit of emotional catharsis against the security risk of disclosing the United States' methods of investigation and the extent of its knowledge. We are quite hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise. *See, e.g., Zadvydas v. Davis,* 533 U.S. 678, 696, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (noting that "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches with respect to matters of national security"). *See also Dep't of the Navy v. Egan,* 484 U.S. 518, 530, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988) (noting that "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"). The assessments before us have been made by senior government officials responsible for

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[14] The Newspapers contend that speculative evidence is insufficient to withstand strict scrutiny. *See Press-Enterprise II,* 478 U.S. at 13, 106 S.Ct. 2735 (requiring "specific, on the record findings"); *Globe Newspaper,* 457 U.S. 596, 609, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (finding government interest insufficient to merit closure without accompanying empirical support). While we acknowledge the force of this contention, strict scrutiny is appropriate only after finding a First Amendment right. Because we find no such right to attend deportation hearings, the speculative nature is not fatal.

investigating the events of September 11th and for preventing future attacks. These officials believe that closure of special interest hearings is necessary to advance these goals, and their concerns, as expressed in the Watson Declaration, have gone unrebutted. To the extent that the Attorney General's national security concerns seem credible, we will not lightly second-guess them.[15]

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[15] It is worth clarifying that we do not here defer to the Executive on the basis of its plenary power over immigration. We do not question that the "power to expel or exclude aliens" is "a fundamental sovereign attribute . . . largely immune from judicial control," *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S.Ct. 625, 97 L.Ed. 956 (1953)), for indeed there is no dispute as to the government's substantive power to expel the special interest detainees. Rather, what is at stake is the *means* the government has chosen to exercise that plenary power.

In *INS v. Chadha*, 462 U.S. 919, 940-41, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), the Court heard a challenge to Congress's decision to create a one-House veto over certain deportation decisions made by the Attorney General. In striking down the legislative veto, the Court noted that "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." *Id.* Most recently, in *Zadvydas*, 533 U.S. at 695-97, 121 S.Ct. 2491, the Court held that despite the government's plenary power to expel immigrants, the Attorney General lacked the authority indefinitely to detain non-citizens whose countries were unwilling to accept their return, and it cited *Chadha* for the proposition that "Congress must choose a constitutionally permissible means of implementing" its immigration power. *Id.* at 695, 121 S.Ct. 2491 (quoting *Chadha*, 462 U.S. at 941-42, 103 S.Ct. 2764). The issue at stake in the Newspapers' suit is not the Attorney General's power to expel aliens, but rather his power to exclude reporters from those proceedings. This is plainly a constitutional challenge to the means he has chosen to effect a permissible end, and under *Zadvydas* we owe no executive deference. We defer only to the executive insofar as it is expert in matters of national security, not constitutional liberties.

We are keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis, when those liberties are likely in greatest jeopardy. On balance, however, we are unable to conclude that openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.

V. CONCLUSION

Whatever the outer bounds of *Richmond Newspapers* might be, they do not envelop us here. Deportation proceedings' history of openness is quite limited, and their presumption of openness quite weak. They plainly do not present the type of "unbroken, uncontradicted history" that *Richmond Newspapers* and its progeny require to establish a First Amendment right of access. We do not decide that there is no right to attend administrative proceedings, or even that there is no right to attend any immigration proceeding. Our judgment is confined to the extremely narrow class of deportation cases that are determined by the Attorney General to present significant national security concerns. In recognition his experience (and our lack of experience) in this field, we will defer to his judgment. We note that although there may be no judicial remedy for these closures, there is, as always, the powerful check of political accountability on Executive discretion.

The importance of this case has not escaped us. As we approached it, we were acutely aware that the countervailing positions of the parties go to the heart of our institutions, our national values, and the republic itself.

Commenting upon the great national dilemma in which this case ineluctably embroils us — the eternal struggle between liberty and security — a number of newspapers have editorialized favorably upon Judge Keith's eloquent language in the *Detroit Free Press* case:

> "Democracies die behind closed doors," . . . "When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."

Others have been less impressed. Michael Kelly has written in the Washington Post:

> "*Democracies die behind closed doors*". So they do, sometimes. But far more democracies have succumbed to open assaults of one sort or another — invasions from without, military coups and totalitarian revolutions from within — than from the usurpation-by-in-camera-incrementalism that Judge Keith fears.
>
> Democracy in America does at this moment face a serious threat. But it is not the threat the judge has in mind, at least not directly. It is true that last September's unprecedented mass-slaughter of American citizens on American soil inevitably forced the government to take security measures that infringed on some rights and privileges. But these do not in themselves represent any real threat to democracy. A real threat could arise, however, should the government fail in its mission to prevent another September 11. If that happens, the public will demand, and will get, immense restrictions on liberties.

Although Mr. Kelly ultimately sided with openness on a case-by-case basis, we find his quoted statements powerful. They certainly seem appropriate to the decision to

close the deportation hearings of those who may have been affiliated with the persons responsible for the events of September 11th, all of the known perpetrators of which were aliens. And they are consonant with the reality that the persons most directly affected by the Creppy Directive are the media, not the aliens who may be deported. As always, these aliens are given a heavy measure of due process – the right to appeal the decision of the Immigration Judge (following the closed hearing) to the Board of Immigration Appeals (BIA) and the right to petition for review of the BIA decision to the Regional Court of Appeals. *See also INS v. St. Cyr,* 533 U.S. 289, 300, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (noting that because the Constitution "provides the Writ of Habeas Corpus shall not be suspended, . . . some judicial intervention in deportation cases is unquestionably required by the Constitution").

Because we find that open deportation hearings do not pass the two-part *Richmond Newspapers* test, we hold that the press and public possess no First Amendment right of access. In the absence of such a right, we need not reach the subsequent questions whether the Creppy Directive's closures would pass a strict scrutiny analysis and whether the District Court's "national in scope" injunction was too broad.

The judgment of the District Court will be reversed.

SCIRICA, Circuit Judge, dissenting.

At issue is not whether some or all deportation hearings of special interest aliens should be closed, but who makes that determination. The answer depends on how we interpret the First Amendment of the Constitution.

The Constitution is silent on the right to public access. But the Supreme Court has framed a qualified right of access that may be overcome by sound reasons. Because no reason is more compelling than national security, closure of special interest alien deportation hearings may well be warranted.

The Supreme Court's test in *Richmond Newspapers* – when a right of access attaches to a particular type of proceeding and whether it may be overcome – applies here. Therefore, I agree with the majority that this test applies to deportation hearings.[1] But I believe the requirements of that test are met. Consequently, I would find a qualified right of access to deportation hearings. Because I believe that Immigration Judges can make these determinations with substantial deference to national security, I would affirm the District Court's judgment.[2]

I. Experience

The Supreme Court has articulated a functional inquiry to determine whether "the place and process have historically been open to the press and general public." *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (*"Press-Enterprise II"*). Deportation hearings have a consistent history of openness. Congress first adopted immigration statutes at the

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[1] Accordingly, I agree with much of parts I and II of the court's learned opinion.

[2] At the same time, I would reverse the District Court's injunction as it applies nationwide. *See* Section IV, *infra.*

end of the nineteenth century. In so doing, Congress expressly closed exclusion proceedings while leaving deportation hearings presumptively open. For at least one hundred years, deportation hearings have remained presumptively open to the public.

Department of Justice regulations, enacted in 1964, provide express approval for presumptively open hearings. *See* 8 C.F.R. § 242.16(a) (1964) ("All hearings, other than exclusion hearings, shall be open to the public except that . . . [f]or the purpose of protecting . . . the public interest, the Immigration Judge may limit attendance or hold a closed hearing."). Although deportation hearings have been only presumptively open, *Richmond Newspapers* itself only recognizes a qualified right of access for criminal proceedings, which may be restricted by a countervailing public interest. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 580-81, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); *see also Press-Enterprise II,* 478 U.S. at 10, 106 S.Ct. 2735; *Globe Newspaper v. Superior Court,* 457 U.S. 596, 606-07, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982).[3]

The Supreme Court has noted that we must assess history "because a tradition of accessibility implies the favorable judgment of experience." *Press-Enterprise II,* 478 U.S. at 8, 106 S.Ct. 2735 (internal quotation omitted); *see also Globe Newspaper,* 457 U.S. at 605, 102 S.Ct. 2613; *Richmond Newspapers,* 448 U.S. at 589, 100 S.Ct. 2814 (Brennan, J., concurring). But this historical assessment

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[3] While exceptions exist for deportation hearings involving abused alien children and spouses, criminal trials have similar exceptions (e.g., there is no public right of access to juvenile criminal proceedings).

does not cabin our review only to proceedings with a pre-constitutional history of openness.[4] Other factors may reveal a favorable judgment of experience for presumptive access to deportation hearings.

Notably, *Press-Enterprise II* relies upon nineteenth and twentieth century history to find a tradition of openness for criminal preliminary hearings. 478 U.S. at 10, 106 S.Ct. 2735. In that case, the Supreme Court observed that "[t]he vast majority of States considering the issue have concluded that the same tradition of accessibility that applies to criminal trials applies to preliminary proceedings." *Id.* at 10 n. 3, 106 S.Ct. 2735. These state court decisions confirmed the value of openness and the Supreme Court thus determined that "[o]pen preliminary hearings . . . have been accorded the favorable judgment of experience." *Id.* at 11, 106 S.Ct. 2735 (quoting *Globe Newspaper,* 457 U.S. at 605, 102 S.Ct. 2613).

Furthermore, the Supreme Court has recognized that the Founders "could not have anticipated the vast growth of the administrative state." *Fed. Mar. Comm'n v. S.C. State Ports Auth.,* 535 U.S. 743, ___, 122 S.Ct. 1864, 1872, 152 L.Ed.2d 962 (2002). In *South Carolina Ports Authority,* the Court observed that "formalized administrative

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[4] Our Court of Appeals has not framed a bright-line test for determining when a historical tradition is lengthy enough to satisfy *Richmond Newspapers*'s experience prong. Our decisions suggest, however, that a more than one hundred year history of openness is sufficient to justify the conclusion that the experience prong has been satisfied. *See, e.g., Whiteland Woods, L.P. v. Township of West Whiteland,* 193 F.3d 177 (3d Cir. 1999); *United States v. Simone,* 14 F.3d 833 (3d Cir. 1994); *United States v. Smith,* 776 F.2d 1104 (3d Cir. 1985); *Publicker Indus., Inc. v. Cohen,* 733 F.2d 1059 (3d Cir. 1984).

adjudications were all but unheard of in the late 18th century and early 19th century." *Id.*[5] For administrative proceedings, therefore, it would appear that the experience inquiry should consider the tradition of access to a particular proceeding within the history of the modern administrative state.[6]

The Supreme Court also noted in *South Carolina Ports Authority* that some administrative adjudications share "numerous common features" with civil judicial proceedings, including an adversarial nature. *Id.* at 1872-73 (citing *Butz v. Economou,* 438 U.S. 478, 513, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (listing similarities between administrative and judicial proceedings)). Based upon these similarities, the Court in both *South Carolina Ports Authority* and *Butz* concluded that constitutional principles applicable to civil trials were relevant to the administrative proceedings at issue.[7] Deportation hearings share

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[5] The Supreme Court has recognized that the "[m]ultiplication of federal administrative agencies and expansion of their functions to include adjudications which have serious impact on private rights [was] one of the dramatic legal developments of the [first half of the twentieth century]." *Wong Yang Sung v. McGrath,* 339 U.S. 33, 36-37, 70 S.Ct. 445, 94 L.Ed. 616 (1950).

[6] Congress crafted the system of deportation hearings during the early years of the modern administrative state. *See* 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 1.4, at 9 (4th ed. 2002) (describing the historical developments of administrative law); Marian L. Smith, *An Overview of INS History, in A Historical Guide to the U.S. Government* 305, 305 (George Thomas Kurian ed., 1998) (detailing how the United States did not begin to question its policy of "free and open immigration" until the late 1800s). Since then, deportation hearings have remained presumptively open.

[7] I agree with the majority that the *South Carolina Ports Authority* holding may not extend "the full panoply of constitutional rights to any

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these common features. I agree with the majority, therefore, that "on a procedural level, deportation hearings and civil trials are practically indistinguishable." Majority Op. at 215.[8]

That the historical tradition supports access to deportation hearings does not imply the existence of a qualified right of access for all administrative proceedings.[9] For example, Social Security benefits claim proceedings are distinguishable. They "are inquisitorial rather than adversarial," in that the Administrative Law Judge undertakes multiple roles as the investigator, counselor, and adjudicator. *Sims v. Apfel,* 530 U.S. 103, 110-11, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000). The Supreme Court has identified the differences between Social Security claims and other administrative proceedings:

> The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although many agency systems of adjudication are based to a significant extent on the judicial model of decisionmaking, the SSA

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administrative proceeding that resembles a civil trial." Majority Op. at 215. The Supreme Court left this question for another day. But its comparison of administrative proceedings to civil trials remains instructive.

[8] On this level, a deportation hearing "walks, talks, and squawks like a civil lawsuit." *South Carolina Ports Authority,* 535 U.S. at ___, 122 S.Ct. at 1873 (internal quotation omitted).

[9] As the Supreme Court has noted, there is a distinction between liberty and property interests in administrative hearings. *Wong Yang Sung,* 339 U.S. at 50-51, 70 S.Ct. 445.

> is perhaps the best example of an agency that is not.

Id. at 110, 120 S.Ct. 2080 (internal quotations omitted).[10]

Congress has provided for presumptively open deportation proceedings from the moment that it first enacted an immigration statutory framework. This century of unbroken openness, especially within the nascent tradition of the administrative state, "implies the favorable judgment of experience" under the *Richmond Newspapers* test.

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[10] Deportation hearings are adversarial proceedings that share many of the features common to civil judicial proceedings that the Supreme Court enunciated in *South Carolina Ports Authority:*

> Federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitutes the exclusive record for decision. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record.

South Carolina Ports Authority, 535 U.S. at ___, 122 S.Ct. at 1873 (quoting *Butz,* 438 U.S. at 513, 98 S.Ct. 2894).

The Supreme Court has held that deportation hearings require a heightened standard of proof, suggesting their unique position within the context of administrative proceedings. *Woodby v. INS,* 385 U.S. 276, 286, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966) (requiring clear, unequivocal, and convincing evidence to support the grounds for deportation). Conversely, many of the other administrative proceedings cited by the government do not share as many of the *South Carolina Ports Authority* common factors, and they may contain other features – the protection of privacy, reputation, and medical information – that counsel against access.

II. Logic

Public access to deportation hearings serves the same positive functions as does openness in criminal and civil trials. But the logic inquiry cannot consist merely of a recitation of the factors supporting open proceedings. "An assertion of the prerogative to gather information must . . . be assayed by considering the information sought and the opposing interests invaded." *Richmond Newspapers,* 448 U.S. at 588, 100 S.Ct. 2814 (Brennan, J., concurring); *accord* Majority Op. at 217 ("[T]he calculus must perforce take account of the flip side – the extent to which openness impairs the public good."). I agree with the majority that the District Court erred in failing to consider the countervailing interest of national security.

The issue in this case is "whether the press and public have a First Amendment right to attend deportation hearings." Majority Op. at 209. The logic analysis set forth by the Supreme Court is directed at a particular structural type of proceeding – in this case, deportation hearings – not a subset based on specific designations such as terrorism. In *Globe Newspaper,* the Court stated this point most clearly. Appellees in that case sought to limit the *Richmond Newspapers* analysis to rape trials. The dissent in *Globe Newspaper* cited evidence of "a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors." 457 U.S. at 614, 102 S.Ct. 2613. The Court rejected this suggestion, stating, "Whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as . . . a rape trial, depends

not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction."[11] *Id.* at 605 n. 13, 102 S.Ct. 2613.

At this stage, we must consider the value of openness in deportation hearings generally, not its benefits and detriments in "special interest" deportation hearings in particular. If a qualified right of access is found to attach to deportation hearings generally, the analysis *then* turns to whether particular issues raised in individual cases override the general limited right of access.

Were the logic analysis focused only on special interest cases, I would agree that national security would likely trump the arguments in favor of access. Although paramount in certain deportation cases – like terrorism – national security is not generally implicated in the panoply of deportation hearings that occur throughout the United States. There are many grounds for deportation – marriage fraud, moral turpitude convictions, and aggravated felonies, to name a few – that do not ordinarily implicate national security.[12] *See* 8 U.S.C. § 1227(a).

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[11] Courts have consistently applied *Richmond Newspapers* in this way. *See, e.g., Press-Enterprise II,* 478 U.S. at 9, 106 S.Ct. 2735 (preliminary hearings); *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ("*Press-Enterprise I*") (criminal trial voir dire); *Richmond Newspapers,* 448 U.S. at 580, 100 S.Ct. 2814 (criminal trials); *Detroit Free Press v. Ashcroft,* 303 F.3d 681, 2002 WL 1972919 (6th Cir. 2002) (detention hearings); *First Amendment Coalition,* 784 F.2d at 473 (judicial review proceedings); *Smith,* 776 F.2d at 1112 (bills of particular); *Publicker,* 733 F.2d at 1069-70 (civil trials).

[12] National security presents similar challenges in some criminal prosecutions. *See* 50 U.S.C. § 1801 et seq. (authorizing the Foreign Intelligence Surveillance Court to issue search warrants in closed

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Accordingly, the demands of national security under the logic prong of *Richmond Newspapers* do not provide sufficient justification for rejecting a qualified right of access to deportation hearings in general. To conclude otherwise would permit concerns relevant only to a discrete class of cases to determine there is no qualified right of access to *any* of the broad range of deportation proceedings, a departure from *Richmond Newspapers.* Whether national security interests justify closure of individual deportation hearings is a question properly addressed in the next step's more particularized inquiry.

III. Government Interests

Having found a qualified right of access to deportation hearings, the question remains whether the government has a sufficient justification to "override the qualified First Amendment right of access" by application of the Creppy Directive. *Press-Enterprise II,* 478 U.S. at 9, 106 S.Ct. 2735.

Where a qualified right of access has been found, courts ordinarily have required a substantial showing to deny access. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is

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proceedings to protect national security). But national security interests have not been sufficient to reject a qualified right of access to criminal trials in general. Instead, if access can be limited, it is because "national security concerns about confidentiality may sometimes warrant closures" as a "countervailing interest[ ] . . . sufficiently compelling to reverse this presumption of openness." *Richmond Newspapers,* 448 U.S. at 598 & n. 24, 100 S.Ct. 2814 (Brennan, J., concurring).

narrowly tailored to serve that interest." *Press-Enterprise I,* 464 U.S. at 510, 104 S.Ct. 819. There must be "a substantial probability" that openness will interfere with these interests. *Press-Enterprise II,* 478 U.S. at 14, 106 S.Ct. 2735. Closure is appropriate only if "reasonable alternatives to closure" are not available to protect the government's interests. *Id.* It bears noting, however, that these cases have not considered the deference due the government in matters involving national security.

The District Court found the Creppy Directive failed to pass muster under this test because, inter alia,[13] it was "not persuaded that the more narrow method of *in camera* disclosure of sensitive evidence . . . is not an acceptable means of avoiding a compromise of the government's investigation." *N. Jersey Media Group, Inc. v. Ashcroft,* 205 F.Supp.2d 288, 302 (D.N.J. 2002).

The government contends it is entitled to greater deference than is captured in this test because of two independent considerations. First, it contends it enjoys broad deference in the immigration area. And second, it argues the District Court erred in failing to afford it the special deference due the political branches in matters concerning national security.

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[13] The District Court also found the Creppy Directive inadequate to the extent it is not fully effective at blocking public access to sensitive information, since the information might become public by any of several other means. *N. Jersey Media Group,* 205 F. Supp. 2d at 301. In my view, the government's rejoinder effectively disposes of this finding.

The District Court undervalued the deference due the government in national security cases.[14] *Id.* at 301-02. Courts have consistently recognized the need for "heightened deference to the judgments of the political branches with respect to matters of national security" when "terrorism or other special circumstances" are at issue. *Zadvydas,* 533 U.S. at 696, 121 S.Ct. 2491. A "principle of judicial deference . . . pervades the area of national security." *Franklin v. Massachusetts,* 505 U.S. 788, 818, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). Consequently, courts have not demanded that the government's action be the one the court itself deems most appropriate in "cases involving discrete categories of governmental action in which there are special reasons to defer to the judgment of the political branches." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 570 n. 5, 113 S.Ct. 2217, 124

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[14] Courts also must acknowledge the "immigration-related expertise of the Executive Branch," and afford its judgments an appropriate level of deference. *Zadvydas v. Davis,* 533 U.S. 678, 700, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). As the District Court acknowledges, the government has traditionally enjoyed near-plenary power to determine the substance of immigration law. *Reno v. Flores,* 507 U.S. 292, 305, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *Yamataya v. Fisher,* 189 U.S. 86, 100-101, 23 S.Ct. 611, 47 L.Ed. 721 (1903). But the courts have been less likely to defer to the government on procedural issues where constitutional rights may be affected. *Zadvydas,* 533 U.S. at 695, 121 S.Ct. 2491; *INS v. Chadha,* 462 U.S. 919, 941-42, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Even in this area, however, the Executive Branch is entitled to a measure of deference given its primary responsibility over immigration matters. Administrative law principles "counsel judges to give expert agencies decisionmaking leeway in matters that invoke their expertise." *Zadvydas,* 533 U.S. at 700, 121 S.Ct. 2491. Therefore, executive decisions in this area should be accorded a special degree of deference.

L.Ed.2d 472 (1993) (Souter, J., concurring); *see also Rostker v. Goldberg,* 453 U.S. 57, 70, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981).

On the other hand, deference is not a basis for abdicating our responsibilities under the First Amendment. *Rostker,* 453 U.S. at 67, 101 S.Ct. 2646; *United States v. United States Dist. Court,* 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) ("domestic security" not a sufficient basis for relaxing warrant requirement; independent assessment of surveillance needs by magistrate generally required); *New York Times Co. v. United States,* 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *United States v. Robel,* 389 U.S. 258, 264, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967) ("Even the war power does not remove constitutional limitations safeguarding essential liberties. . . . Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart.") (internal quotation omitted). At issue is whether the Creppy Directive constitutes an impermissible restriction on the press and public's right of access to deportation hearings. Moreover, there is no apparent reason to abandon the traditional framework for assessing the relative force of the government's interests as against the right of access, so long as deference is afforded the judgments of the Executive Branch in these matters. *Cf. Rostker,* 453 U.S. at 70, 101 S.Ct. 2646 ("We do not think that the . . . law will be advanced by any further 'refinement' in the applicable tests as suggested by the Government" to accommodate deference in military affairs.).

In this case, the government's asserted interest – national security – is exceedingly compelling. Closure in some – or perhaps all – special interest cases may be necessary and appropriate. In fact, the Department of

Justice regulations, enacted in 1964, expressly authorize an Immigration Judge to hold closed hearings to protect the public interest. But the question remains whether the Creppy Directive's blanket closure rule – which removes the decision to close the hearing from the Immigration Judge on a case-by-case basis – is reasonably necessary for the protection of national security.

The government contends that a case-by-case closure of removal proceedings would permit the release of sensitive information, potentially revealing sources, patterns and methods of investigation. But there is no reason that all of the information related to a particular detainee cannot be kept from public view. Even the initial determination to close a proceeding – and to seal the entire record – can be accomplished in camera and under seal. The government need only make the required showing of special interest, under seal to the Immigration Judge, subject to appellate review. In making their determinations, Immigration Judges should grant substantial deference to national security interests. A similar procedural framework has proven workable with criminal prosecutions.[15]

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[15] The Classified Information Procedures Act provides for pretrial conferences and motion hearings to determine limits on the use and disclosure of classified and national security related information in criminal prosecutions. 18 U.S.C.App. 3 §§ 2-4, 6, 8. These proceedings may be held in camera and, in certain circumstances, ex parte. *Id.* §§ 2-4, 6; *United States v. Klimavicius-Viloria,* 144 F.3d 1249, 1260-61 (9th Cir. 1998). Congress also has created the Foreign Intelligence Surveillance Court to hold closed reviews of search warrant requests on a case-by-case basis, rejecting a framework where the Department of Justice makes its own judgments on these matters in national security cases. 50 U.S.C. § 1801 et seq.

The government maintains that these protections would be ineffective given the complexities in combating terrorism. It contends that individual, seemingly innocuous pieces of information, including a special interest alien's name, could be harmful to national security when compiled by terrorists into a mosaic. This seems correct. Nevertheless, the government could make the same argument to an Immigration Judge, who could determine, with substantial deference, that the apparently innocuous information provides appropriate grounds for closure.

The Watson Declaration also expresses the fear that open deportation hearings could provide evidence to terrorists that certain border crossings offer a greater chance for illegal entry than others. At oral argument, government counsel offered an intriguing hypothetical where open hearings would reveal evidence that 0-of-30 terrorists had entered the United States successfully through Philadelphia, while the rate was 30-of-30 in New York City. Here too, however, the government could make this argument during a closed preliminary hearing at which the Immigration Judge, with appropriate deference to national security, could assess the government's concerns about publicizing patterns of information.

The Creppy Directive and the pre-existing Department of Justice regulations both accommodate the government's national security responsibilities. But a case-by-case approach would permit an Immigration Judge to independently assess the balance of these fundamental

values.[16] Because this is a reasonable alternative, the Creppy Directive's blanket closure rule is constitutionally infirm.[17] As the Supreme Court reasoned in *Globe Newspaper:*

> We emphasize that our holding is a narrow one: that a rule of mandatory closure . . . is constitutionally infirm. In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public. . . . But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional.

457 U.S. at 611 n. 27, 102 S.Ct. 2613.

The stakes are high. Cherished traditions of openness have come up against the vital and compelling imperatives of national security. Because I believe national security interests can be fully accommodated on a case-by-case basis, I would affirm that part of the District Court's judgment.

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[16] As noted, the Department of Justice regulations permit an Immigration Judge to close deportation hearings in their entirety in order to protect the public interest. This closure is broader in scope than what is likely to occur in criminal prosecutions because immigration proceedings call for greater deference to the government on matters of national security.

[17] As noted, the Supreme Court held in *Press-Enterprise II* that a restriction on a qualified right of access fails if there are "reasonable alternatives to closure." 478 U.S. at 14, 106 S.Ct. 2735.

IV. Nationwide Injunction

The final issue is whether the scope of the District Court's nationwide injunction is overbroad. The grant of a permanent injunction is reviewed for abuse of discretion. *Nutrasweet Co. v. Vit-Mar Enters., Inc.,* 176 F.3d 151, 153 (3d Cir. 1999). I would hold that the District Court abused its discretion by issuing a nationwide injunction that bars enforcement of the Creppy Directive in any special interest proceeding and against any member of the general public or press. A narrower remedy will provide full relief to plaintiffs and allow other courts to explore this difficult constitutional question.

Generally, a plaintiff is only entitled to relief for itself. *Ameron, Inc. v. U.S. Army Corps of Eng'rs,* 787 F.2d 875, 888 (3d Cir. 1986). In the First Amendment context, "although the occasional case requires us to entertain a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute, we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." *United States v. Nat'l Treasury Employees Union,* 513 U.S. 454, 477-78, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (citation omitted). In this case, injunctive relief should apply only to those parties actually before the court if that relief fully protects the litigants. *See Ameron,* 787 F.2d at 890.

Furthermore, where the government is involved in litigation, a court should not "thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States v. Mendoza,* 464 U.S. 154, 160, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984). Because constitutional proscriptions frequently challenge governmental action, different parties

will likely assert the same constitutional claim against the government. *Id.* Where this happens, the Supreme Court has said that "[a]llowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *Id.*

In this case, the only plaintiffs are North Jersey Media Group and New Jersey Law Journal. An injunction protecting these plaintiffs alone would remedy any violation of plaintiffs' First Amendment rights. Enjoining enforcement of the Creppy Directive against other parties goes beyond providing relief to plaintiffs, and it deprives the Supreme Court of the opportunity to review the decisions of several courts of appeals. For these reasons, I would reverse the District Court's nationwide injunction.

APPENDIX B

205 F.Supp.2d 288

United States District Court,
D. New Jersey.

NORTH JERSEY MEDIA GROUP, INC.;
New Jersey Law Journal, Plaintiffs,
v.
John ASHCROFT, Attorney General of the United States; Hon. Michael Creppy, Chief Immigration Judge of the United States, Defendants.

No. Civ.A. 02-967(JWB).

May 28, 2002.

Gibbons, Del Deo, Dolan, Griffinger & Vecchione, by Lawrence S. Lustberg, Shavar D. Jeffries, Newark, New Jersey, American Civil Liberties Union of New Jersey Foundation, by Edward Barocas, Newark, New Jersey, Georgetown University Law Center, by David Cole, Washington, D.C., American Civil Liberties Union, by Steven R. Shapiro, Lucas Guttentag, Lee Gelernt, New York City, Center for Constitutional Rights, by Nancy Chang, Shayana D. Kadidal, New York City, for plaintiffs.

United States Department of Justice, Civil Division, by Robert D. McCallum, Jr., Assistant Attorney General, Civil Division, Michael P. Lindemann, Assistant Director, Terri J. Scadron, Senior Litigation Counsel, Brenda M. O'Malley, Trial Attorney, Laura L. Flippin, Office of Immigration Litigation U.S. Department of Justice, Civil Division, Washington, D.C., Christopher J. Christie, United States Attorney, by Michael A. Chagares, Chief, Civil Division, Newark, New Jersey, for defendants.

Reitman Parsonnet, by Bennet Zurofsky, Newark, New Jersey, for amicus curiae.

OPINION

BISSELL, Chief Judge.

This matter comes before the Court pursuant to plaintiffs' motion for a preliminary injunction. Defendants have filed opposition to the motion and have cross-moved for dismissal for lack of jurisdiction and for failure to state a claim.

Federal subject matter jurisdiction is asserted under 28 U.S.C. § 1331.

FACTUAL AND PROCEDURAL BACKGROUND

This action was initiated with the filing of a Complaint in this Court on March 6, 2002. Plaintiff North Jersey Media Group, Inc. is the publisher of the Herald News and the Record, two daily newspapers serving the northern New Jersey area. Plaintiff New Jersey Law Journal publishes a weekly newspaper covering law and public affairs. Plaintiffs allege that defendants John Ashcroft, the Attorney General of the United States, and the Honorable Michael Creppy, Chief Immigration Judge (collectively, "defendants" or "the government") have denied plaintiffs' right of access to certain deportation proceedings as protected by the First Amendment of the United States Constitution and federal regulation, specifically 8 C.F.R. § 3.27.

The facts alleged in the Complaint are as follows: Ten days after the terrorist attacks of September 11, 2002, Chief Immigration Judge Michael Creppy issued a memorandum to all Immigration Judges and Court Administrators, informing them that the Attorney General "'has implemented additional security procedures for certain

cases in the Immigration Court.'" (Compl., ¶ 9) (quoting Memorandum from Chief Judge Michael Creppy to Immigration Judges of Sept. 21, 2001 ("Creppy Memo"), attached to Complaint as Exhibit A). To these "special interest" cases, the Creppy Memo applies a series of "additional security" procedures. Among these procedures is the requirement that Immigration Judges "hold the hearings individually, [ ] close the hearing to the public, and [ ] avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court.'" (*Id.*, ¶ 10). Moreover, every special interest case "'is to be heard separately from all other cases on the docket,'" and "'[t]he courtroom must be closed for these cases – no visitors, no family, no press.'" (*Id.*, ¶ 11). The Creppy Memo restricts public access to docket information, as well, specifically providing that "'restriction on information includes confirming or denying whether [a] [special interest case] is on the docket or scheduled for a hearing.'" (*Id.*, ¶ 12). The restrictions and closure procedures of the Creppy Memo apply to all cases selected by the Attorney General. There is no provision in the Creppy Memo for an individualized determination of the reasons for closure in a given case. Furthermore, the directive does not require the government to demonstrate whether measures other than closure would serve its interests. (*Id.*, Exh. A).

Plaintiffs allege, on information and belief, that scores, if not hundreds, of immigration hearings are currently being closed in this district pursuant to the Creppy Memo. For example, on November 22, 2001, Jim Edwards, a reporter for the Law Journal, was denied access to proceedings before the Immigration Court by court personnel acting under the dictates of the Creppy

Memo. On February 13, 2002, Edwards was denied access to a hearing to be held the following day regarding Ahmed Raza before Immigration Judge ("IJ") Eugene Pugliese in Newark. On the day of the hearing, IJ Pugliese closed the proceedings pursuant to the Creppy Memo, barring Hillary Burke, a reporter for the Herald, from observing the proceedings. On the previous day, Burke was refused docket information with respect to special interest cases. On February 21, 2002, Edwards and Burke attempted to attend the removal hearing of Malek Zeidan,[1] a resident alien, before IJ Annie Garcy in Newark. When Judge Garcy called Zeidan's case, she asked the attorney for the INS whether the matter was a special interest case. Upon the attorney's affirmative response, Judge Garcy closed the hearing, ordering all members of the public, including the two reporters, to leave the courtroom. It is alleged that these instances are illustrative of a great many additional

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[1] On February 28, 2002, Zeidan filed a Complaint in this Court challenging the Creppy Memo as it applied to his removal proceedings. *See Zeidan v. Ashcroft*, Civil 02-843 (JWB). The Complaint asserted claims arising under the Due Process Clause of the Fifth Amendment, an INS regulation, and the Administrative Procedures Act. Since the filing of that action, the government removed the "special interest" designation from his case, and moved to dismiss the action as moot. By letter of April 2, 2002, Bennet Zurofsky, counsel for Mr. Zeidan, confirmed that he would not oppose the government's motion. Accordingly, the *Zeidan* case was dismissed without prejudice on April 16, 2002.

The Court requested Mr. Zurofsky to appear as amicus in the instant matter to address the implications of the Creppy Memo on a "special interest" alien. The Court has benefitted from Mr. Zurofsky's submission and argument, particularly with respect to due process. As discussed, *infra*, due process considerations are intertwined with the inquiry into whether there exists a tradition of openness in connection with deportation proceedings.

proceedings that will be similarly restricted under the dictates of the Creppy Memo.

DISCUSSION

This matter came before the Court on motions by the government to dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim and by the plaintiffs for a preliminary injunction. Although it had already been fully briefed, the government indicated at oral argument that it was no longer pursuing its jurisdictional motion, conceding that general federal question jurisdiction was present under 28 U.S.C. § 1331. However, subject matter jurisdiction cannot be conferred by consent of the parties; it must be determined by the Court. Therefore, this Opinion begins with a discussion of the jurisdictional concerns raised originally by the government. The Court will then provide a consolidated discussion of the legal merits of plaintiffs' claims. Finally, the Court will address the remaining elements of the preliminary injunction motion.

I. GOVERNMENT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION IS DENIED.

A. Standard for Motion to Dismiss for Lack of Subject Matter Jurisdiction

It is axiomatic that the jurisdiction of the federal courts is limited and that the district courts are permitted to decide only claims falling within their subject matter jurisdiction as prescribed by the Constitution or federal statute. *See* U.S. Const. art. III, § 2; *Rice v. United States, BATF,* 68 F.3d 702, 706 (3d Cir. 1995). Proper adjudication

depends on the existence of subject matter jurisdiction at all times throughout the duration of the case. Never presumed to exist, federal subject matter jurisdiction must be affirmatively demonstrated by the party seeking to invoke it before the court may proceed to the merits of the case. *Philadelphia Federation of Teachers v. Ridge,* 150 F.3d 319, 323 (3d Cir. 1998); *Development Finance Corp. v. Alpha Housing & Health Care, Inc.,* 54 F.3d 156, 158 (3d Cir. 1995).

B. Application

In its moving papers, the government argued that various sections of the Immigration and Nationality Act ("INA"), as amended by the Illegal Immigrant Reform, and Immigrant Responsibility Act of 1996 ("IIRIRA"), 110 Stat. 3009-546, preclude jurisdiction over the instant action.[2] Specifically, the government argued that this Court's jurisdiction to hear this action is barred by 8 U.S.C. § 1252(a)(1), (b)(9), (f)(1), (g).

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[2] Alternatively, the government suggested that this case is moot, observing that the two aliens named in the complaint and as to whom the Creppy Memo had been applied are no longer of "special interest." The Court believes that any mootness concerns would be obviated by the exception for cases "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911). Application of that exception is appropriate because (1) it is reasonably assumed that these plaintiffs will again be denied access to other special interest hearings and (2) immigration hearings are usually of brief duration. *See Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 602, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (applying exception to mootness in similar circumstances).

As an initial matter, the Court observes that this suit is brought under the general federal question statute, 28 U.S.C. § 1331, by organizations of the press alleging that an administrative directive has denied them a right of access to immigration hearings that is protected by the First Amendment and federal regulations. These claims undoubtedly raise federal questions within the meaning of § 1331. Assuming for the moment the existence of plaintiffs' right of action, the relevant inquiry is whether the statutory sections cited by the government withdraw what would otherwise be valid subject matter jurisdiction over these claims.

1. Preliminary Issues

Before turning to the language of these sections, it is important to discuss certain presumptions that are implicated here. First, when examining legislation that arguably affects the court's jurisdiction, there is a presumption in favor of finding judicial review of administrative actions. *INS v. St. Cyr,* 533 U.S. 289, 298, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). Furthermore, in traditionally sensitive areas, courts presume that Congress does not intend to foreclose jurisdiction unless it does so in clear and plain terms. *Gregory v. Ashcroft,* 501 U.S. 452, 461, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Although this principle has often been invoked where the issue is a purported congressional abrogation of the states' Eleventh Amendment immunity, *see, e.g., Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), or a repeal of habeas jurisdiction, *see, e.g., St. Cyr,* 533 U.S. at 298-99, 121 S.Ct. 2271, it flows from the longstanding recognition that repeals by implication are not favored. Indeed, they are disallowed when legislation

is capable of an alternative construction that is compatible with judicial review. *Ex parte Yerger,* 8 Wall. 85, 19 L.Ed. 332 (1868). This Court believes that this precept is apt where, as here, a defendant asserts repeal of federal subject matter jurisdiction to entertain claims under the First Amendment.

Furthermore, the Supreme Court has recognized that these presumptions are reinforced by customary canons of interpretation. Specifically, the Supreme Court has advised that "when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *St. Cyr,* 533 U.S. at 299, 121 S.Ct. 2271. Moreover, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible' we are obligated to construe the statute to avoid such problems." (*Id.* at 299-300, 121 S.Ct. 2271) (citations omitted). Both canons are in play in the present action because the government advanced the view of the IIRIRA sections that would deprive a federal court of jurisdiction to hear a constitutional claim. The consequence of this position in the present case is to negate any opportunity for plaintiffs to raise a pure question of law in any court. *St. Cyr,* 533 U.S. at 300, 121 S.Ct. 2271 ("A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions.") Though the government argued that the instant claims are foreclosed from jurisdiction under the INA, as amended, it failed to explain how these plaintiffs would be permitted to raise a First Amendment challenge to the Creppy Memo in the context of an immigration proceeding to which they are

not parties. A statutory interpretation having the effect of precluding any judicial scrutiny of an asserted constitutional violation cannot be imposed if a reasonable alternative construction is available.

2. Analysis

The particular statutory provisions cited by the government are found in the INA, as amended by the IIRIRA, codified at 8 U.S.C. § 1252. The first indication that these provisions do not affect this Court's jurisdiction is the title of § 1252 which, though not dispositive, states: "Judicial review of orders of removal." 8 U.S.C. § 1252. This language appears to define the scope of the provisions to follow. This appearance is confirmed in the immediately succeeding subsection, which provides:

> **(a) Applicable provisions**
>
> (1) General orders of removal
>
> Judicial review *of a final order of removal* (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

8 U.S.C. § 1252(a)(1) (emphasis added). Section 1252(a)(2) goes on to exclude jurisdiction, except as provided in subsection (e), over any claim "arising from or relating to the implementation or operation of an *order of removal* pursuant to section 1225(b)(1)." 8 U.S.C. § 1252(a)(2) (emphasis added). The language of limitation employed in these subsections is critical to defining both the scope of

their application and the consequent impact of existing grants of jurisdiction. The clear import of these provisions is that they apply only to orders of removal and their consequences.

Also cited in the government's brief is § 1252(g), which provides:

> (g) Exclusive jurisdiction
>
> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g). The government argued that the present action is one that challenges a decision of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders. In fixing the scope of this provision, the Supreme Court's decision in *Reno v. American-Arab Anti-Discrimination Committee* 525 U.S. 471, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) ("*AADC*") is most instructive.

In *AADC,* the issue was whether § 1252(g) deprived the district courts of jurisdiction over aliens' claims that the INS was enforcing selectively against them certain administrative requirements, in violation of the First Amendment. Interpreting the scope of § 1252(g) the Court rejected the position taken by both parties, which was "the unexamined assumption that § 1252(g) covers the universe of deportation claims – that it is a sort of 'zipper' clause that says 'no judicial review in deportation cases unless

this section provides judicial review.'" (*Id.* at 482, 119 S.Ct. 936). Rather, the Court held that § 1252(g) applies to three discrete actions that may be taken by the Attorney General, namely, to *commence* proceedings, *adjudicate* cases, or *execute* removal orders. (*Id.*) The Court acknowledged a range of other actions that may be part of the deportation process but not within the meaning of § 1252(g), such as the decisions to "open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse consideration of that order."[3] (*Id.*) The Third Circuit has also recognized this rather narrow scope of § 1252(g). *Liang v. INS,* 206 F.3d 308, 318 (3d Cir. 2000). Here the Creppy Memo's closure mandates are not within the limited meaning of § 1252(g).

Moreover, the government sought to avoid the obvious incongruity between § 1252(g)'s "by or on behalf of any alien" language and the fact that the instant claims are brought, not by or on behalf of aliens, but by press organizations in their own rights, by contending that the provisions of subsection (b)(9) consume even the instant claims. Section 1252(b)(9) is but one of a number of statutory requirements for the specialized review established by § 1252(a)(1). As the Court has already observed, this entire procedure as a fundamental matter is tied to orders of removal. Specifically, § 1252(b)(9) provides:

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[3] Because § 1252(g) applied to the Attorney General's decision to prosecute the aliens, the Court held that the district court lacked jurisdiction over their claims of selective prosecution. *AADC,* 525 U.S. at 487, 119 S.Ct. 936.

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought *to remove an alien from the United States under this subchapter* shall be available only in judicial review of a final order under this section.

8 U.S.C. 1252(b)(9) (emphasis added). Clearly, the terms of this section, as well, limit its applicability to the removal context. In contradistinction, the Court regards the instant claim as stemming from a government order that affects the right of access of the press and public to administrative hearings arising independent of any action or proceedings to remove an alien from the United States.

Finally, the government relied in its jurisdictional motion on § 1252(f)(1).[4] First and foremost, this provision is not jurisdictional in nature, but is clearly a limitation on injunctive relief. Second, it prohibits injunctions that block the operation of the provisions of 8 U.S.C. §§ 1221-1231. Here, plaintiffs challenge the operation of the Creppy Memo, which is collateral, at best, to the substantive

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[4] Section 1252(f)(1) provides:

> **(f) Limit on injunctive relief**
>
> (1) In general
>
> Regardless of the nature of the action or claim or of the identify of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. § 1221-1231] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f).

operation of the provisions specifically insulated from injunctive remedies by § 1251(f)(1). Third, even assuming that § 1252(f)(1) applied to this case, it would limit only the Court's authority to grant injunctive relief and not impact the possibility of granting declaratory relief, which is also sought.

In sum, the Court determines that none of the provisions of the INA discussed above deprive this Court of jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.[5] Accordingly, the Court will proceed to discuss the merits of plaintiffs' claims, addressing both the government's motion to dismiss for failure to state a claim and the "merits" prong of the preliminary injunction analysis.

II. THE COMPLAINT STATES A CLAIM IN PART AND PLAINTIFFS HAVE SHOWN A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS IN PART.

A. Standard for Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams,* 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) (citing *Hishon v. King &*

[5] With respect to its determinations as to 8 U.S.C. § 1252(b)(9), (f)(1) and (g), this Court is in accord with the decision of the United States District Court for the Eastern District of Michigan in *Detroit Free Press v. Ashcroft,* 195 F.Supp.2d 948 (E.D. Mich. 2002) (Edmunds, J.), involving a suit brought to challenge the very same Creppy Memo, in which that court denied similar arguments advanced by the government on its motion to dismiss.

Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)); *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). When considering a Rule 12(b)(6) motion, the court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff. *Morse v. Lower Merion School District,* 132 F.3d 902, 906 (3d Cir. 1997). The motion to dismiss will be granted only when it is beyond doubt that plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *Nami v. Fauver,* 82 F.3d 63, 65 (3d Cir. 1996) (citing *Conley,* 355 U.S. at 45, 78 S.Ct. 99).

B. Standard for Preliminary Injunction

The grant of a preliminary injunction is an extraordinary remedy that should be granted only in limited circumstances. *Frank's GMC Truck Center, Inc. v. General Motors Corp.,* 847 F.2d 100, 102 (3d Cir. 1988). This is particularly so when "the motion comes before the facts are developed to a full extent through the normal course of discovery." *AT & T Co. v. Winback and Conserve Program, Inc.,* 42 F.3d 1421, 1427 (3d Cir. 1994). The primary purpose of a preliminary injunction is to preserve the status quo of an action pending final determination. *In re Arthur Treacher's Franchise Litigation,* 689 F.2d 1150 (3d Cir. 1982).

It is well settled that in order to grant a preliminary injunction, the court must determine:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial

> of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999). "'The injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief.'" *Merchant Evans, Inc. v. Roosevelt Building Products*, 963 F.2d 628, 632-33 (3d Cir. 1992) (quoting *Opticians Ass'n v. Independent Opticians*, 920 F.2d 187, 192 (3d Cir.1990)).

C. Count I: Plaintiffs' Claim for Violation of a Right of Access to Deportation Proceedings Arising Under the First Amendment

1. Congress' Plenary Authority Over Immigration Policy

In this action, plaintiffs claim a right of access to deportation proceedings under the First Amendment. As a threshold contention, the government submits that judicial recognition of such a right is precluded because the authority of the political branches of government is plenary in immigration matters.

Although cases recognize that Congress' power to determine who may enter and remain in the United States is plenary, *Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972); *Galvan v. Press*, 347 U.S. 522, 531-32, 74 S.Ct. 737, 98 L.Ed. 911 (1954), it is equally established that this power must be administered

in a manner that respects procedural safeguards of due process.[6] *Galvan,* 347 U.S. at 531, 74 S.Ct. 737 ("In the enforcement of [Congress' substantive immigration] policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . ."); *Yamataya v. Fisher,* 189 U.S. 86, 100-101, 23 S.Ct. 611, 47 L.Ed. 721 (1903) (*"The Japanese Immigrant Case"*) (recognizing due process right of resident aliens to hearing on issues concerning right to remain in United States). This distinction between the substantive power of Congress to set immigration policy and the *procedures* chosen to effectuate that policy runs throughout the Supreme Court's jurisprudence. *Zadvydas v. Davis,* 533 U.S. at 695, 121 S.Ct. 2491; *INS v. Chadha,* 462 U.S. 919, 940-41, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). To wit, the Court has cautioned that "[t]he substantive power is subject to important constitutional limitations." *Zadvydas,* 533 U.S. at 695, 121 S.Ct. 2491.

The government insists that the restrictions at issue on a purported First Amendment right to access is within the plenary substantive authority of Congress. The case they rely upon most heavily is *Kleindienst v. Mandel,* 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972), involving

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[6] The Court notes that the case law uniformly recognizes that only aliens who are deemed to have entered the territory of the United States enjoy the protections of due process. *Zadvydas v. Davis,* 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001); *Landon v. Plasencia,* 459 U.S. 21, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982) (observing that cases entitled a continuously present resident alien to a fair hearing and due process when threatened with deportation). Here, plaintiffs have made clear that their challenge does not extend to exclusion proceedings.

an action to compel the Attorney General to admit a Marxist scholar to the United States whom American plaintiffs had invited to participate in academic conferences and discussions. The Attorney General denied requests to exercise his discretion to waive (as it pertained to the scholar) a statutory exclusion that expressly prohibited admission to aliens who advocate world communism or totalitarianism. (*Id.* at 760, 92 S.Ct. 2576). The plaintiffs argued that the decision violated their First Amendment right to receive the ideas and viewpoint of the scholar. The Supreme Court, though recognizing that legitimate constitutional rights were implicated, rejected the proposition that Congress' substantive power to "make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden" may not be exercised where it would deny First Amendment rights. (*Id.* at 766, 92 S.Ct. 2576). Moreover, the Court held that the exercise of discretionary authority by the Attorney General under the challenged provision was insulated from judicial scrutiny if supported by a "facially legitimate and bona fide reason . . . ." (*Id.* at 770, 92 S.Ct. 2576). The government argues that the dictates of the Creppy Memo are subject to the same deferential treatment.

The Court disagrees with the government that *Kleindienst* provides the applicable standard for this case, and in no way sees it as a rule for decision here. Significantly, the challenged government action in *Kleindienst,* as in the other cases cited by the government,[7] was inextricably

[7] In these cases, the courts of appeals upheld an immigration regulation imposing a two-year foreign residency requirement on aliens

(Continued on following page)

related to a particular substantive judgment by Congress in setting admission policy. Accordingly, it was deemed an exercise of substantive plenary authority. At issue here, however, is a blanket directive issued by the Executive Branch to close deportation hearings in "special interest" cases, attenuated from any particular policy determination made by Congress with respect to admission of immigrants. It is essentially a procedural mechanism that has been chosen to implement the substantive dictates of the immigration policy. Moreover, as revealed by its own arguments, the aim of the Creppy closure restrictions is not principally to advance the application of the immigration statutes but, rather, to serve other law enforcement objectives. In sum, the Court determines that the Creppy Memo is not immune from judicial review under the guise of substantive plenary authority.[8]

In this event, the government contends that even decisions dubbed "procedural" should be subjected to the deferential *Kleindienst* standard. Whatever may be said about this broad contention, the cases cited by the government do not support application of the *Kleindienst* standard to the action challenged here. For instance, the

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who marry citizens during deportation proceedings against challenges that the regulation interfered with the citizen spouses' fundamental right of marriage. *Azizi v. Thornburgh,* 908 F.2d 1130, 1133-36 (2d Cir. 1990); *Almario v. Attorney General,* 872 F.2d 147, 150-52 (6th Cir. 1989); *Anetekhai v. INS,* 876 F.2d 1218, 1220-24 (5th Cir. 1989).

[8] Moreover, a proper understanding of *Kleindienst* shows that it does not support the government's contention that, conceptually, the notion of plenary congressional authority over setting immigration policy negates the existence of First Amendment rights. Rather, *Kleindienst recognized* that plaintiffs may possess First Amendment rights in disputes over immigration decisions.

government cites with approval *Landon v. Plasencia,* 459 U.S. 21, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982), which directs that, in considering the extent of due process appropriate to a given immigration situation, courts should recognize that immigration matters are largely subject to the control of the political branches. While this is undoubtedly true, what is pertinent here is whether there are restrictions on judicial review of the press and public's right of access to deportation proceedings under the First Amendment. Significantly, *Landon* does not provide an answer to this question.

2. Determining the Existence of a First Amendment Right of Public Access to Deportation Proceedings

a. Selecting the Applicable Standard

The next issue to be considered is whether the First Amendment affords to the press and public a right of access to deportation hearings. Plaintiffs argue that the right of access should be governed by the standards set forth in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), and its progeny. The government responds that this test is not appropriate, and, assuming that it is, that plaintiffs cannot demonstrate a right of access to deportation hearings by its standards.

In *Richmond Newspapers,* the Supreme Court was asked to decide "whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires

closure." (*Id.* at 564, 100 S.Ct. 2814). Summarizing the evolution of the modern criminal trial, the Court observed that presumptive openness of the proceedings to the public was a constant feature. Notwithstanding that no constitutional provision expressly guaranteed a public right of access to judicial proceedings, the Court found that the freedoms guaranteed by the First Amendment, shared a "common core purpose of assuring freedom of communication on matters relating to the functioning of government." (*Id.* at 575, 100 S.Ct. 2814). Put in the context of the case before it, the Court surmised: "[w]hat this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that the Amendment was adopted." (*Id.* at 576, 100 S.Ct. 2814).[9]

In the wake of *Richmond Newspapers,* courts have repeatedly referred to the decision as authority for the numerous interests that are served by open judicial proceedings, such as:

> promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing a significant

[9] Although there was no majority opinion in *Richmond Newspapers,* seven members of the Court agreed that a right of public access to criminal trials is embodied in the First Amendment and applied to the states through the Fourteenth Amendment. *See Globe Newspaper v. Superior Court,* 457 U.S. 596, 603 and n. 11, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982).

> community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury.

United States v. Smith, 787 F.2d 111, 114 (3d Cir. 1986) (summarizing *Richmond Newspapers*); *United States v. Criden,* 675 F.2d 550, 555-56 (3d Cir. 1982). These traditionally recognized interests are by no means exclusive. *See, e.g., United States v. Raffoul,* 826 F.2d 218, 224 (3d Cir. 1987) ("Open trials enable the public to scrutinize the performance and demeanor of police, prosecutors, and the judiciary and to detect bias or incompetency.") (" 'Every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.'") (quoting *Cowley v. Pulsifer,* 137 Mass. 392 (1884) (Holmes, J.)).

Moreover, the considerations giving rise to the presumption of openness espoused in *Richmond Newspapers* have been distilled into a working standard. Specifically, in *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 9, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("Press-Enterprise II"), the Court determined that the existence of a qualified First Amendment right to access proceedings turns on the complementary considerations of "experience" and "logic." The experience factor considers whether there is a "tradition of accessibility" attendant to a given place and process. (*Id.* at 8, 106 S.Ct. 2735). The logic factor asks whether public access plays a significant positive role in the functioning of the particular process in question. (*Id.* at 8-9, 106 S.Ct. 2735). When both are present, a qualified First Amendment right to public access attaches with respect to the particular proceedings. (*Id.* at 9, 106

S.Ct. 2735; *see also United States v. Simone,* 14 F.3d 833, 837 (3d Cir. 1994)).

The government argues that the existence of any First Amendment right of access to deportation hearings is foreclosed outright by *Houchins v. KQED, Inc.,* 438 U.S. 1, 14, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978), and *Capital Cities Media, Inc. v. Chester* 797 F.2d 1164, 1167 (3d Cir. 1986) (*en banc*). In *Houchins,* the Supreme Court ruled against members of the press who sought access to county jail facilities asserting that the First Amendment guaranteed them a first-hand opportunity to inspect prison conditions. 438 U.S. at 15-16, 98 S.Ct. 2588. Similarly, in *Capital Cities,* the Third Circuit disavowed the existence of an asserted First Amendment right of public access to agency documents pertaining to water contamination. 797 F.2d at 1176. Significantly, both of these cases concerned purported rights of access to or disclosure of government-held information; they did not involve access to government proceedings, which is at issue here.

Alternatively, the government emphasizes the fact that no courts have recognized a First Amendment right of access to deportation proceedings. While this may be so, this observation neither negates such a right nor provides a basis for departing from the *Richmond Newspapers* experience and logic test. To the contrary, this test has been applied time and again to extend the recognition of public rights to access proceedings beyond the trial phase. *See Press-Enterprise I,* 464 U.S. at 501-04, 104 S.Ct. 819 (voir dire examination and juror selection); *Press Enterprise II,* 478 U.S. at 13, 106 S.Ct. 2735 (preliminary hearings); *United States v. Smith,* 787 F.2d 111, 116 (3d Cir. 1986) (transcripts of sidebars or chambers conferences concerning evidentiary rulings); *United States v. Criden,*

675 F.2d 550, 554 (3d Cir. 1982) (pretrial suppression, due process and entrapment hearings); *United States v. Simone,* 14 F.3d 833, 842 (3d Cir. 1994) (post-trial examination of juror for potential misconduct). More importantly, the *Richmond Newspapers* test has been applied to particular proceedings outside the criminal judicial context. *Publicker Indus., Inc. v. Cohen,* 733 F.2d 1059 (3d Cir. 1984) (extending *Richmond Newspapers* rationale to civil trials); *Whiteland Woods, L.P. v. West Whiteland,* 193 F.3d 177, 181 (3d Cir. 1999) (applying test to find right of access to municipal planning meeting); *Cal-Almond, Inc. v. United States Dept. of Agriculture,* 960 F.2d 105, 109 (9th Cir. 1992) (applying test to administrative voter list); *Society of Prof. Journalists v. Secretary of Labor,* 616 F.Supp. 569, 574 (D. Utah 1985) (applying test to administrative hearing). Accordingly, the Court will assess whether plaintiffs enjoy a First Amendment right of access to deportation hearings under the standard of *Richmond Newspapers* and its progeny.

b. Applying the Richmond Newspapers Standard

(1) The "History of Openness" Prong

In assessing a history of openness in deportation, the Court begins with the observation that the first immigration statute in this country was enacted in 1875. *INS v. St. Cyr,* 533 U.S. 289, 305, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). Although the openness of deportation proceedings, as opposed to exclusion proceedings, has not been the subject of a statutory provision, in 1903 the Supreme Court held that due process rights attached to proceedings to remove a resident alien, the touchstone of which is the right to an open hearing. *The Japanese Immigrant Case,*

189 U.S. 86, 23 S.Ct. 611, 47 L.Ed. 721 (1903). Thus, from 1903 onward, hearings that comport with due process have been an element of deportation. Furthermore, since 1964, federal regulations have expressly provided a presumption of openness for deportation proceedings. 8 C.F.R. § 242.16(a) (1964); 8 C.F.R. § 3.27 (2002). This stands in contrast to longstanding statutes that have provided affirmatively that *exclusion* proceedings are to be "kept separate and apart from the public." *Immigration Laws and Regulations,* Article 6, at 4 (Mar. 11, 1893); Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213 (1903); Immigration and Nationality Act of 1952 ("INA"), 66 Stat. 163, § 236(a) (1952). The foregoing demonstrates a history of openness in *deportation* proceedings that points favorably toward finding a public right of access.

Alternatively, even assuming, as the government contends, that there has been no clear showing of a history of openness attendant to deportation proceedings, there is certainly no tradition of their presumptive closure. These circumstances implicate the cases in which the Third Circuit has recognized a First Amendment right of access despite the absence of a history of openness. For instance, in *United States v. Simone,* 14 F.3d 833 (3d Cir. 1994), the newspaper plaintiffs sought access to closed judicial examinations of jurors to investigate alleged misbehavior. Applying the *Richmond Newspapers* test, the court of appeals found that the juror misconduct proceedings at issue had neither a clear history of openness nor one of closure. Accordingly, the court of appeals concluded that "on the whole, the 'experience' prong of the 'logic and experience' test provides little guidance in this case." (*Id.* at 838). Under the circumstances, it was appropriate to determine the existence of a right of access primarily by

reference to the "logic" prong of the analysis. (*Id.*) Here, were the Court inclined to find that there had been no showing of historical openness in deportation proceedings, it would nevertheless proceed to the "logic" inquiry under the Third Circuit's decision in *Simone*.

(2) The "Logic" Prong

Concerning the "logic" prong, there is no doubt that deportation proceedings inherently involve a governmental process that affects a person's liberty interest and, as the Supreme Court has held, must comport with constitutional guarantees of due process. Thus, the ultimate individual stake in these proceedings is the same as or greater than in criminal or civil actions. Moreover, the proceedings have undeniable similarities to judicial proceedings. For instance, at such hearings: the alien appears before an immigration judge; a list of charges is filed; the alien may be represented by counsel; the alien has an opportunity to examine evidence against him, to present evidence on his behalf and to cross-examine witnesses. 8 U.S.C. § 1229a(b)(4). Thus, there are abundant similarities between these proceedings and judicial proceedings in the criminal and civil contexts. The parallels in both the nature of the right at stake and the character of the proceedings lead to the conclusion that the same functional goals served by openness in the civil and criminal judicial contexts would be equally served in the context of deportation hearings. Accordingly, the Court determines that there is a qualified right of public access to deportation hearings protected by the First Amendment.

3. The Requirement that a Government Restriction of Right of Public Access be Narrowly Tailored to Serve Compelling Interest

Under *Globe Newspaper,* government action that curtails a First Amendment right of access "in order to inhibit the disclosure of sensitive information" must be supported by a showing "that denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co.,* 457 U.S. at 606-607, 102 S.Ct. 2613.

The government's asserted interests in implementing the Creppy Memo fall into two categories: (1) avoidance of setbacks to its terrorism investigation caused by open hearings; and (2) prevention of stigma or harm to detainees that might result if hearings were open. These interests are supported by the declarations of James S. Reynolds, Chief of Terrorism and Violent Crimes Section of the Justice Department's Criminal Division, executed in pending Freedom of Information Act litigation, and Dale Watson, Executive Assistant Director for Counter Terrorism and Counterintelligence of the FBI. Much of these declarations describe the possible consequences if the names of "special interest" detainees and the circumstances of their arrests were disclosed to the public. For instance, such disclosure could: subject the detainees to harm or intimidation; deter them from cooperating in the event of their release; reveal the direction and progress of investigations; facilitate others in creating false or misleading evidence; reveal sensitive investigatory information. (Reynolds Cert., ¶¶ 14-17; Watson Cert., ¶¶ 11-23).

The problem with the Creppy Memo is that there is nothing in it to prevent disclosure of this very information by the "special interest" detainee or that individual's

lawyer, both of whom are permitted to be present in the "special interest" proceedings. Furthermore, if an appeal is taken, the transcript of the proceedings below would be disclosed in any event. Therefore, by definition, the Creppy closure dictates are not narrowly tailored to serve the government's interests because they do not advance those interests. *Accord Detroit Free Press v. Ashcroft,* 195 F.Supp.2d 937 (E.D. Mich. 2002). Moreover to the extent that the Creppy Memo is said to serve the interest of insulating the individual detainee from humiliation or stigma, its mandates sweep too broadly because it does not permit the individual to elect such protective treatment. Surely this interest is co-extensive with the individual's preference to see it invoked, given that closure may be seen by some detainees as having a negative impact upon them and their interests. Finally, the Court is not persuaded that the more narrow method of *in camera* disclosure of sensitive evidence, if need for such a procedure is appropriate under the facts of a particular case, is not an acceptable means of avoiding a compromise of the government's investigation. For these reasons, the Creppy Memo is not narrowly tailored to serve the asserted government interests.

4. Conclusion

In sum, the Court determines that plaintiffs have demonstrated a reasonable likelihood of success on the merits of Count I. Correspondingly, the government has not demonstrated that Count I of the Complaint "fails to

state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6).[10]

D. Count II: Plaintiffs' Claim for Violation of INS Regulations

In Count II of the Complaint, plaintiffs allege that the Creppy Memo violates the regulations pertaining to closure of deportation hearings, 8 C.F.R. §§ 3.27, 240.10(B). Section 240.10(b) governs removal proceedings and states that "[r]emoval hearings shall be open to the public, except that the immigration judge may, in his or her discretion, close proceedings as provided in § 3.27 of

---

[10] *First Amendment Coalition v. Judicial Inquiry and Review Board,* 784 F.2d 467 (3d Cir. 1986), heavily relied upon by the government, does not compel a different result here. That case does not support a blanket conclusion that administrative proceedings are not subject to a First Amendment right of access claim. If that were so, the lengthy discussion of access in that case, in several different opinions from the *en banc* court, would have been unnecessary. Under review in that case was a provision in the recently adopted Constitution of the Commonwealth of Pennsylvania which established a Judicial Inquiry and Review Board where proceedings were to be made public only at the point where judicial discipline was recommended. *First Amendment Coalition* is, therefore, distinguishable on three bases. First, considerable deference was accorded to the provisions of a *state constitution,* (*id.* at 475), a situation not present here where an *administrative memorandum* of a *federal* agency is under review. Second, it was clear in that case that there was no history or tradition of openness in this newly-created supplement to the "cumbersome and ineffective" proceedings for judicial impeachment. (*Id.* at 473). Third, the inquiry in *First Amendment Coalition* was not whether these disciplinary proceedings should be closed entirely, but at what point along the time-line should there be public access and disclosure. (*Id.* at 474). In the case at bar, *First Amendment Coalition* does not dictate a decision in the defendants' favor.

this chapter." 8 C.F.R. § 240.10(b). Section 3.27, in turn, provides in relevant part:

> **§ 3.27 Public access to hearings.**
>
> All hearings, other than exclusion hearings, shall be open to the public except that:
>
> (a) Depending upon physical facilities, the Immigration Judge may place reasonable limitations upon the number in attendance at any one time with priority being given to the press over the general public;
>
> (b) For the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing.

8 C.F.R. § 3.27. Plaintiffs assert that these regulations permit closure of deportation proceedings only on a case-by-case basis upon the finding of the particular immigration judge that sufficient conditions exist to justify closure. Neither the regulations themselves nor their enabling statutes expressly provide a right of enforcement through a civil action for perceived violations. Therefore, the Court must address whether an implied right of enforcement exists.

In considering the question of implied right of action, the Court is guided by the recent decision of the Supreme Court in *Alexander v. Sandoval,* 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). In *Sandoval,* the Court considered whether there was a private enforcement right for Department of Justice regulations promulgated under section 602 of Title VI of the Civil Rights Act of 1964. In reaching the conclusion that there was no such right, the Court reaffirmed that the determinative factor in the

inquiry is Congress' statutory intent to create a "freestanding" cause of action. (*Id.* at 286-87, 121 S.Ct. 1511, "Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.") Even when the inquiry is directed to an agency regulation, the analysis must focus squarely on the intent underlying the enabling statute. (*Id.* at 290-91, 121 S.Ct. 1511, rejecting the notion that the language of the regulation can conjure up a private right of action) ("Agencies may play sorcerer's apprentice but not the sorcerer himself.") As restated in *Sandoval,* congressional intent to create a private right of enforcement is disclosed by the language and structure of the statute. (*Id.* at 288-92, 121 S.Ct. 1511). The relevant issue in the present case, therefore, is whether the enabling statutes for 8 C.F.R. §§ 3.27 and 240.10(b) reveal the requisite intent. Plaintiffs obliquely refer to the provisions of 8 U.S.C. § 1229a, discussed above in a different context, in support of their argument that an implied right of action exists under the regulations. As observed, § 1229a establishes certain protocols for removal proceedings, such as: requiring formal charges and the presence of the alien, entitling that individual to representation by counsel, granting an opportunity to present supportive evidence and examine contrary evidence, and similar requirements. 8 U.S.C. § 1229a. Although these provisions inject into the removal hearings elements that parallel judicial proceedings, *see supra,* they do not manifest an intent to create a right of action in favor of the public or press to enforce the presumption of openness embodied in the cited regulations. The language of § 1229a neither precludes nor affords the public a right of access. Though congressional intent to create such a right was not determinative in the Court's investigation into the tradition of openness that

attends deportation proceedings, it is in the instant analysis. There being no manifestation of congressional intent to create a right in favor of the public to enforce 8 C.F.R. §§ 3.27 and 240.10(b), there can be no implied right of action to challenge the Creppy Memo on the ground that it collides with these provisions.

Plaintiffs rely heavily on *Pechter v. Lyons,* 441 F.Supp. 115 (S.D.N.Y. 1977), to support their argument that a right of action is implied in this case. In *Pechter,* members of the general public challenged an immigration judge's decision to close deportation hearings on the basis of an INS regulation nearly identical to 8 C.F.R. § 3.27. As a threshold matter, the court found that the public had a right to pursue the cause of action under the regulation. Decided nearly 25 years before *Sandoval, Pechter* simply does not stand up against the recent decision in this area. The approach taken there was designed principally to advance the sound and recognized policy of openness in adjudications affecting liberty rights. Nevertheless, the court did not examine the enabling statute to determine whether it revealed the requisite congressional intent. Therefore, the approach taken in *Pechter* cannot be squared with the analysis compelled by *Sandoval.*

Plaintiffs maintain that the creation of an implied right would ensure that the procedures Congress enacted for removal hearings are administered properly. They further argue that there is no statement by Congress that negates an implied right of action. The Court's decision in *Sandoval* makes clear that neither of these considerations can overcome the absence of affirmative evidence of congressional intent to create a right of enforcement. *Sandoval,* 532 U.S. at 286-87, 121 S.Ct. 1511 ("Without it, a cause of action does not exist and courts may not create

one, no matter how desirable that might be as a policy matter, or how compatible with the statute.")

III. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE HARM, BALANCE OF HARMS, AND PUBLIC INTEREST.

A. Irreparable Harm

In order to be entitled to a preliminary injunction, the party seeking the injunction must demonstrate that irreparable harm will result if relief is denied. *Allegheny Energy, Inc. v. DQE, Inc.,* 171 F.3d 153, 158 (3d Cir. 1999). "Generally, '[i]n a First Amendment challenge, a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights.'" *ACLU v. Reno,* 217 F.3d 162, 180 (3d Cir. 2000); *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")

Plaintiffs seek to enjoin the operation of the Creppy Memo to the extent that it bars the press and public from deportation hearings designated as "special interest" cases without a particularized determination that closure is necessary to advance an important interest. The Court has determined that the Creppy Memo violates plaintiffs' right of access to these proceedings. Without an injunction, the government could continue to bar the public and press from deportation proceedings without any particularized showing of justification. This presents a clear case of irreparable harm to a right protected by the First Amendment.

B. Balance of Harms

The next step in the preliminary injunction analysis requires the Court to consider "whether granting preliminary relief will result in even greater harm to the nonmoving party." *Allegheny Inc.*, 171 F.3d at 158. There is no basis for finding that the harm caused to the government would outweigh the value achieved by enjoining a practice that violates the Constitution. Even if enforced, the Creppy Memo does not guarantee nondisclosure of the facts and proceedings which it addresses. Furthermore, even in the wake of an injunction barring the operation of the Creppy Memo, the government will be in the same position it occupied before the closure edict issued, that is, closure of deportation proceedings in specific individual cases will be attainable pursuant to the INS's own regulations. 8 C.F.R. §§ 3, 27, 240.10(b).

C. Public Interest

Finally, the Court must also determine "whether granting the preliminary relief will be in the public interest." *Allegheny Inc.*, 171 F.3d at 158. "Curtailing constitutionally protected speech will not advance the public interest, and 'neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.'" *ACLU*, 217 F.3d at 180 (quoting *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 866 (E.D.Pa. 1996)). This principle is particularly significant when what is at stake in the action is the *public's own* right of access to deportation proceedings. Therefore, the issuance of a preliminary injunction enjoining the operation of the Creppy Memo is in the public interest. The countervailing interests advanced by the government regarding the impeding of terrorism are serious and

legitimate, particularly in the wake of the dastardly attacks of September 11, 2001 and the continuing threat of their repetition. However, these concerns can be well served by addressing the need to close specific proceedings regarding particular deportees. Therefore, under the present circumstances the balancing of public interests also tips in favor of the plaintiffs and their First Amendment rights.

Because plaintiffs have demonstrated that each of the four prongs of the analysis favors the entry of a preliminary injunction, the Court will grant the requested relief.

CONCLUSION

Defendants' motion to dismiss for lack of subject matter jurisdiction was withdrawn at oral argument. Defendants' motion to dismiss the Complaint for failure to state a claim is granted in part and denied in part. Plaintiffs' motion for a preliminary injunction is granted. The form of injunctive order submitted by the plaintiffs is appropriate; therefore, the Court has executed and filed that order with this Opinion, together with its own order addressing the defendants' motions.

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is, on this 28th day of May, 2002, ORDERED that:

(1.) Defendants' motion to dismiss the Complaint for lack of subject matter jurisdiction was withdrawn and, therefore, that motion is itself dismissed.

(2.) Defendants' motion to dismiss the Complaint for failure to state a claim is granted in part and denied in part.

THIS MATTER having been opened to the Court by Plaintiffs North Jersey Media Group, Inc. and New Jersey Law Journal, through its above-captioned attorneys, by way of Complaint, declarations, Order to Show Cause, and Brief in Support of Its Application for Order to Show Cause and Preliminary Injunction, and the Court having set the return date on the Order to Show Cause for April 5, 2002, and Defendants John Ashcroft and Hon. Michael Creppy, by and through their counsel, opposing said application for injunctive relief, and the Court hearing arguments of counsel on April 5, 2002, and the Court having found good cause for the entry of a preliminary injunction;

IT IS on this 28th day of May, 2002;

ORDERED that during the pendency of this action and until further Order of this Court, Defendants are hereby enjoined and restrained from enforcing the Creppy Memo; and it further

ORDERED that during the pendency of this action and until further Order of this Court, Defendants are hereby enjoined and restrained from closing to the public any immigration proceedings in the absence of case-specific findings demonstrating that closure is narrowly tailored to serve a compelling governmental interest in closure; and it is further

ORDERED that a copy of this Order shall be circulated within 7 days hereof.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2524

NORTH JERSEY MEDIA GROUP, INC.;
NEW JERSEY LAW JOURNAL

v.

JOHN ASHCROFT, Attorney General
of the United States; MICHAEL CREPPY, HON.

John Ashcroft, Attorney General of the
United States and Michael Creppy, Chief
Immigration Judge of the United States, Appellants

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 02-cv-00967)
District Judge: Honorable John W. Bissell, Chief Judge

Present: BECKER, Chief Judge, SLOVITER,
SCIRICA, NYGAARD, ROTH, McKEE, RENDELL,
BARRY, AMBRO, FUENTES, SMITH, and
GREENBERG* Circuit Judges.

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

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* As to panel rehearing only.

The petition for rehearing filed by Appellees having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED. Judges Sloviter, Nygaard, McKee, Rendell and Ambro would grant rehearing.

BY THE COURT:

/s/ Edward R. Becker
Chief Judge

DATED: DEC 2, 2002

ch/cc: LG
LG
LSL
GGK
RML
SS
DAS

APPENDIX D

AMENDED

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2524

NORTH JERSEY MEDIA GROUP, INC.;
NEW JERSEY LAW JOURNAL

v.

JOHN ASHCROFT, Attorney General
of the United States; MICHAEL CREPPY, HON.

John Ashcroft, Attorney General of the
United States and Michael Creppy, Chief
Immigration Judge of the United States, Appellants

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 02-cv-00967)
District Judge: Honorable John W. Bissell, Chief Judge

Present: BECKER, Chief Judge, SLOVITER,
SCIRICA, NYGAARD, ROTH, McKEE, RENDELL,
BARRY, AMBRO, FUENTES, SMITH, and
GREENBERG[1] Circuit Judges.

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[1] As to panel rehearing only.

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellees having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED. Judges Sloviter, Nygaard, McKee, Rendell and Ambro would grant rehearing. Judge Sloviter notes that she votes for rehearing for the reasons set forth in Judge Scirica's dissent.

BY THE COURT:

/s/ Edward R. Becker
Chief Judge

DATED: DEC 3, 2002

ch/cc: LG
LG
LSL
GGK
RML
SW
DAS

APPENDIX E

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

---

2. Section 3.27 of Title 8 of the Code of Federal Regulations (2003) provides:

> Public access to hearings.
>
> All hearings, other than exclusion hearings, shall be open to the public except that:
>
> (a) Depending upon physical facilities, the Immigration Judge may place reasonable limitations upon the number in attendance at any one time with priority being given to the press over the general public;
>
> (b) For the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing.
>
> (c) In any proceeding before an Immigration Judge concerning an abused alien spouse, the hearing and the Record of Proceeding shall be closed to the public unless the abused spouse agrees that the hearing and the Record of Proceeding shall be open to the public. In any proceeding before an Immigration Judge concerning

an abused alien child, the hearing and the Record of Proceeding shall be closed to the public.

(d) Proceedings before an Immigration Judge shall be closed to the public if information subject to a protective order under § 3.46, which has been filed under seal pursuant to § 3.31(d), may be considered.

---

3. Section 240.10(b) of Title 8 of the Code of Federal Regulations (2003) provides:

> Public access to hearings. Removal hearings shall be open to the public, except that the immigration judge may, in his or her discretion, close proceedings as provided in § 3.27 of this chapter.

APPENDIX F

From: Michael Creppy
To: All Immigration Judges: Court Administrators
Date: 9/21/2001 12:20 PM
Subject: Cases requiring special procedures

To All Immigration Judges and Court Administrators:

As some of you already know, the Attorney General has implemented additional security procedures for certain cases in the Immigration Court. Those procedures require us to hold the hearings individually, to close the hearing to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court.

If any of these cases are filed in your court, you will be notified by OCIJ that special procedures are to be implemented. A more detailed set of instructions will be forwarded at that time to the judge handling the case and the court administrator. If you have questions about the handling of security arrangements for a particular case, you should contact your Assistant Chief Immigration Judge.

Although this is obviously a time of heightened security and concern, I am confident that each of us will remember our obligation to be fair and impartial in our dealings with everyone who comes to our courts. Thank you for your understanding and your cooperation.

Michael J. Creppy
Chief Immigration Judge

cc: Adkins-Blanch, Chuck; Philbin, Peggy; Rooney, Ke[Illegible]

Instructions for cases requiring additional security

PLEASE DO NOT DISCLOSE

Immigration Courts are beginning to receive cases for which the Department of Justice is requiring special arrangements. Your court has received the following cases that fall in this category:

NAME A-NUMBER

If any more are to be filed in your court, you will be notified as we receive more information from the Department.

The following procedures are being followed for these cases:

1. Because some of these cases may ultimately involve classified evidence, the cases are to be assigned only to judges who currently hold at least a secret clearance.

2. You should make certain that INS (or whoever provides your courtroom security) is informed of the hearing and the need to provide additional courtroom security.

3. Each of these cases is to be heard separately from all other cases on the docket. The courtroom must be closed for these cases – no visitors, no family, and no press.

4. The Record of Proceeding is not to be released to anyone except an attorney or representative who has an EOIR-28 on file for the case (assuming the file does not contain classified information). Any other request for information on one of these cases must be submitted in writing and processed as a

FOIA request, i.e., forwarded to the Office of the General Counsel.

5. This restriction on information includes confirming or denying whether such a case is on the docket or scheduled for a hearing. Any press requests must be referred to the Public Affairs Office at (703)-305-0289.

6. The ANSIR record for the case is to be coded to ensure that information about the case is not provided on the 1-800 number and the case is not listed on the court calendars posted outside the courtrooms.

7. Specific instructions about ANSIR coding and marking the ROP are provided below.

8. Finally, you should instruct all courtroom personnel, including both court employees and contract interpreters, that they are not to discuss the case with anyone.

If you have any questions regarding the procedures outlined, please contact Anthony A. Padden, Chief Clerk, at (703) 305-1247.

Procedures for ANSIR coding and marking ROP

1. Case creation

The Hearing Actions Screen (PF2) contains a field marked "Release Information to 1-800 (Y/N)." The default is set to "Y". The options are "Y" "N" or "X". The clerk should change the "Y" to "X". Entering "X" in this field will ensure three things: 1) no information about the case will be available through the 1-800 number; 2) a warning whenever anyone else attempts to enter the ANSIR

record; and 3) removing all information about the case from court calendars that are printed.

2. For 1-800 number

When the case is properly coded, the message on the 1-800 number is:

Information can not be released regarding this case. Please contact your local Immigration Court or the Board of Immigration Appeals if further information is required.

3. For data entry screen

When the case is properly coded, the initial ANSIR screen will display this message:

WARNING WARNING

Information about this case is not to be disclosed.

If you receive any questions or requests for information about this case, you should refer them to the court administrator.

Do not disclose any information about this case.

4. For ROPs

Regular blue ROP jackets should be used, but Court Administrators should buy large stamps that say:

Do not disclose contents of this record.

Please stamp the front and back of the ROP.

APR 25 2003

No. 02-1289

In the Supreme Court of the United States

NORTH JERSEY MEDIA GROUP INC., ET AL.,
PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
ROBERT M. LOEB
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Attorneys
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QUESTION PRESENTED

Whether the First Amendment affords the public a right of access to administrative deportation proceedings for aliens designated by the Executive as linked to the government's ongoing investigation of the September 11th terrorist attacks.

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In the Supreme Court of the United States

No. 02-1289

NORTH JERSEY MEDIA GROUP INC., ET AL.,
PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 308 F.3d 198. The opinion of the district court (Pet. App. 65a-99a) is reported at 205 F. Supp. 2d 288.

JURISDICTION

The court of appeals entered its judgment on October 8, 2002. The petition for rehearing initially was denied on December 2, 2002, and an amended order denying rehearing was entered on December 3, 2002 (Pet. App. 100a-103a). The petition for a writ of certiorari was filed on February 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. The Attorney General has long been charged with the "administration and enforcement" of "all * * * laws relating to the immigration and naturalization of aliens," including the deportation of aliens who are present unlawfully in the United States. 8 U.S.C. 1103(a)(1), 1227(a) (2002). Deportation proceedings—which the Immigration and Nationality Act now denominates "removal proceedings"—are conducted by immigration judges, 8 U.S.C. 1229a(b), who are part of the Executive Office for Immigration Review within the Department of Justice. See 8 C.F.R. Pt. 1003, 1003.9 *et seq.* (2003). The proceedings are conducted under procedures set forth in regulations established by the Attorney General. See 8 U.S.C. 1229a(b), 1103(a)(3) (authorizing the Attorney General to prescribe "such regulations * * * as he deems necessary"). A regulation in force since 1964 permits the closure of removal hearings "[f]or the purpose of protecting witnesses, parties, or the public interest." 8 C.F.R. 1003.27 (2003); see also 8 C.F.R. 3.27 (1992); 8 C.F.R. 3.25 (1987); 29 Fed. Reg. 13,241, 13,243 (1964). Since April 1997, that regulation also has mandated the closure of removal hearings for abused alien children and spouses. See 8 C.F.R. 1003.27 (2003); 62 Fed. Reg. 10,334, 10,335 (1997).[1]

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[1] The Homeland Security Act of 2002, Pub. L. No. 107-296, § 1102(2), 116 Stat. 2273, and the Homeland Security Act of 2002 Amendments, Pub. L. No. 108-7, Div. L, § 105(a)(1), 117 Stat. 531, transferred responsibility for administration and enforcement of the immigration and naturalization laws to the Secretary of Homeland Security, effective March 1, 2003. However, the Attorney General retains such "powers, functions, and duties" as are conferred by statute, including the administrative adjudication of removal proceedings, and the Secretary's administration and

2. On September 11, 2001, the al Qaeda terrorist network attacked the United States, murdering thousands of innocent civilians. In response, the President ordered and Congress approved the use of "all necessary and appropriate force against those nations, organizations, or persons" determined by the President to have "planned, authorized, committed, or aided the terrorist attacks." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224. Congress found that terrorists "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States," and stressed the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Ibid.*

The federal government immediately launched an intensive investigation both to identify those responsible for the September 11th attacks and to detect and prevent future terrorist attacks. Gov't C.A. App. 80-81 (Watson Decl.). In the course of that investigation, the government became aware of numerous aliens who were present in this country in violation of the immigration laws, some of whom were detained and placed in removal proceedings. *Id.* at 80-82. Some of those aliens, as well as some aliens already in government custody, were identified as "special interest" cases on the basis of law-enforcement or intelligence information that they "might have connections with, or possess information pertaining to, terrorist activity," such as close associations with the September 11th hijackers or with al Qaeda or related groups. *Id.* at 82.

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enforcement activities are also subject to the Attorney General's "determination and ruling * * * with respect to all questions of law[, which] shall be controlling." 8 U.S.C. 1103(a)(1) (2002).

Ten days after the terrorist attacks and in conjunction with the ongoing law enforcement investigation, the Attorney General implemented revised procedures for immigration proceedings in special interest cases. In conjunction with that effort, Chief Immigration Judge Michael Creppy issued a memorandum to all immigration judges and court administrators concerning the handling of immigration cases arising out of the terrorism investigation. Gov't C.A. App. 54-57 (Creppy Memorandum). In pertinent part, the Creppy Memorandum instructs immigration judges and court administrators to "close * * * to the public" administrative hearings in all special interest cases. *Id.* at 54. The memorandum also bars public access to the administrative record and docket information in such cases. *Id.* at 55.

The Creppy Memorandum was issued to protect the national security and public safety by preventing sophisticated terrorist organizations like al Qaeda from learning about the government's ongoing terrorism investigation. Gov't C.A. App. 83-88 (Watson Decl.). The closure policy protects against disclosure of both obviously sensitive information—such as evidence that the government knows of particular links between a detainee and terrorist activity—and also information the significance of which may not be apparent in isolation, but that can be "fit into a bigger picture by terrorist groups in order to thwart the Government's efforts to investigate and prevent terrorism." *Id.* at 83. Public disclosure during removal hearings of information about how and why special interest aliens were detained, for example, "would allow the terrorist organization to discern patterns and methods of investigation"; information about how such aliens entered the country "would allow the terrorist organization to see

patterns of entry, what works and what doesn't"; information "about what evidence the United States has against members of a particular cell collectively" would reveal to the terrorist organization which of its cells have been significantly compromised and, by indirection, which have not, and would allow terrorists "to alter their plans in a way that presents an even greater threat to the United States." *Id.* at 84. In addition, disclosure of information the government possesses, as well as indications of what information the United States does *not* possess, could allow terrorist organizations to evade detection, alter future attacks, obstruct pending proceedings, and deter cooperation with the government's ongoing terrorism investigation. *Id.* at 86-87. Finally, disclosure would intrude upon the privacy interests of those aliens, witnesses, and lawyers, who may not wish to be associated publicly with the September 11th investigation.

During the course of the government's investigation, approximately 766 detainees were designated as "special interest" cases, 611 of whom had one or more administrative hearings closed in accord with the Creppy Memorandum. Some of those aliens were subsequently transferred to law enforcement authorities for criminal prosecution (such as Zacarias Moussaoui). Approximately 505 of those special interest aliens have already been deported.[2] In addition, because government

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[2] That an alien was deported rather than prosecuted does not mean that the alien had no knowledge of or connection to terrorism. In many cases, the Department of Justice determined that the best course of action to protect national security was to remove potentially dangerous individuals from the Country and ensure that they cannot return. Nor may such an inference be drawn from the fact that an alien was deported on grounds facially unrelated to terrorism. Such charges would have been withheld, for

investigators continued to reevaluate the progress, direction, and circumstances of the investigation and "special interest" designations arising out of it, some aliens who were initially designated as "special interest" cases were subsequently removed from that category. See Gov't C.A. App. 83 (Watson Decl.).

3. Petitioners, a newspaper and a publisher, brought a First Amendment challenge to the Creppy Memorandum, seeking injunctive relief permitting public access to removal proceedings for special interest aliens. The district court held that the press and public have a First Amendment right to attend immigration removal hearings under *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (plurality), which found a First Amendment right of access by the public to criminal proceedings in court. The court concluded that closure under the Creppy Memorandum unconstitutionally infringed on the public's First Amendment rights. Pet. App. 65a-99a. The district court granted a nationwide injunction in favor of petitioners prohibiting enforcement of the Creppy Memorandum and barring the government "from closing to the public any immigration proceedings in the absence of case-specific findings demonstrating that closure is narrowly tailored to serve a compelling governmental interest." *Id.* at 99a.

The district court and the Third Circuit denied the government's motions for a stay pending appeal. The government subsequently applied for and obtained a stay in this Court, which ordered that the district court's injunction be "stayed pending the final disposition of the government's appeal of that injunction to the United States Court of Appeals for the Third Circuit."

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example, if their assertion could have compromised ongoing investigations or sensitive intelligence matters.

Ashcroft v. *North Jersey Media Group, Inc.*, 122 S. Ct. 2655 (2002).

4. The court of appeals reversed the district court's injunction. Pet. App. 1a-64a. As an initial matter, the court of appeals held that the government's argument that there is no First Amendment right of access to administrative proceedings was foreclosed by circuit precedent, although it described the notion that the *Richmond Newspapers* test applies to administrative proceedings as "open to debate as a theoretical matter." Pet. App. 5a.

Applying the test outlined in *Richmond Newspapers* and its progeny for identifying a constitutional right of access to judicial proceedings in criminal cases, the court of appeals held that there was no "history of access to political branch proceedings" in general, and that both Congress and the Executive Branch had long excluded and continue to exclude the public from sensitive government proceedings and records. Pet. App. 23a-24a. Even in the limited context of removal proceedings, the court noted, the practice of public access was far too "recent and inconsistent" to be the basis for a constitutional requirement of open proceedings. *Id.* at 26a. The court noted that, since the 1890s, the governing statute expressly required closed *exclusion* proceedings, *id.* at 26a-27a & nn.8, 9; see also 8 C.F.R. 1003.27 (2003), and that historically, deportation proceedings were frequently held in places to which the public lacked free access, Pet App. 29a-30a. While a more recent regulation, now codified at 8 C.F.R. 1003.27 (2003), provides that certain types of removal proceedings are open unless closed "[f]or the purpose of protecting witnesses, parties, or the public interest," the court reasoned that this "recent—and rebuttable—regulatory presumption is hardly the stuff of which

Constitutional rights are forged." Pet. App. 30a. Basing a constitutional right of access on that regulation, the court concluded, would improperly interfere with agencies' authority to set their own procedures and would have the "ironic[]" and "incredible" result of discouraging agencies from opening their proceedings to the public. *Id.* at 36a-37a.[3]

The court also held that the "logic" prong of the *Richmond Newspapers* test—which asks whether openness would play a positive role in the proceedings, 448 U.S. at 569-573—failed to support a right of public access to removal hearings in special interest cases. The court reasoned that considering solely the benefits of public access would render the "logic" inquiry essentially meaningless, because access to any government proceeding would appear to "serve[] some good." Pet. App. 39a. Instead, the court weighed the public interest in access against the potential harms arising from open proceedings, and concluded that allowing public access could significantly harm the national security and the effectiveness of the government's terrorism investigation by revealing sensitive and confidential

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[3] The court rejected petitioners' argument that *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), required it to recognize a First Amendment right of access based on certain functional similarities between the procedures employed in removal proceedings and those used in judicial trials. Pet. App. 33a-34a. The court explained that the fundamental premise in *South Carolina Ports* was that the Framers intended for "state sovereign immunity [to] shield[] nonconsenting states from complaints brought by private persons, regardless of where private persons bring those complaints." *Id.* at 34a. No comparable premise applied here, the court reasoned, given the lack of a "fundamental right to attend government proceedings." *Id.* at 35a.

information. On balance, and giving due deference to Executive Branch judgments about national security, the court determined that public access could not be said to "play a positive role in special interest deportation hearings." *Id.* at 44a-45a.

Judge Scirica dissented, arguing that the lack of a statute closing removal proceedings and the existence of a regulatory presumption of openness in certain classes of proceedings showed a "history" of public access under *Richmond Newspapers*. Pet. App. 47a-53a. Judge Scirica also criticized the majority for considering the harms of public access only to special interest cases, although he "agree[d] that national security would likely trump the arguments in favor of access" in special interest cases and found the government's interests in closure to be so "exceedingly compelling" that "[c]losure in some—or perhaps all—special interest cases may be necessary and appropriate." *Id.* at 54a-56a, 59a.

ARGUMENT

The decision of the court of appeals is correct, because there is no First Amendment right of public access to Executive Branch proceedings in general or to removal proceedings involving special interest aliens in particular. Petitioners accurately note that the Third and Sixth Circuits have issued divergent opinions concerning public access to the removal hearings of special interest aliens. Nevertheless, an exercise of this Court's certiorari jurisdiction at this time is not warranted, for three reasons. First, because the Sixth Circuit's contrary decision permitting access affirmed a preliminary injunction limited to the removal proceedings for one individual, who has now been ordered removed and whose case is no longer pending before

any immigration judge, the conflict in the circuits is not sufficiently pressing or mature to warrant this Court's resolution. Second, the passage of time has all but exhausted the class of special interest aliens currently facing proceedings before an immigration judge. Third, the government's ongoing examination and review of its procedures and regulations for handling immigration proceedings in cases implicating national security, intelligence, and law enforcement interests, particularly in the context of combating international terrorism, suggests that review at this juncture would be premature.

1. Petitioners argue (Pet. 17-20) that this Court should grant review to resolve a conflict between the Third and Sixth Circuits over whether the public has a constitutional right of access to the removal hearings of special interest aliens.

In *Detroit Free Press* v. *Ashcroft*, 303 F.3d 681 (2002), the Sixth Circuit held that the public has a First Amendment right of access to the removal proceedings for an individual alien, Rabih Haddad, comparable to the access afforded the public in criminal cases under *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). See 303 F.3d at 694-705. The Sixth Circuit found the requisite history of public openness in deportation hearings based on the absence of a statute closing such hearings, and on a 38-year-old regulation (8 C.F.R. 1003.27 (2003); see also 8 C.F.R. 3.27 (1992); 8 C.F.R. 3.25 (1987); 29 Fed. Reg. 13,241, 13,243 (1964)), which provides that deportation hearings may be closed, *inter alia*, to protect witnesses, parties, and the public interest, and which, since 1997, has mandated closure in cases involving abused alien children and spouses. See 303 F.3d at 700-703.

Having identified what it perceived to be a tradition of public access to deportation hearings, the court held that the Creppy Memorandum was insufficiently tailored to survive strict scrutiny. See *Detroit Free Press*, 303 F.3d at 705-711. The court acknowledged that the government has a compelling interest in protecting national security and the integrity of its investigation, *id.* at 706, but that interest, the court believed, could be adequately protected by making closure decisions on a case-by-case or hearing-by-hearing basis, *id.* at 708-710. The court dismissed as speculative the government's concern that the sensitivity of information will not always be apparent or provable on a piecemeal basis. *Id.* at 707, 709, 710.

The Sixth Circuit then ordered the government to provide public access to all future removal proceedings for Haddad, unless the government demonstrated a particularized need to close a hearing, and to disclose transcripts and related documents from Haddad's past proceedings. The government complied with that order, closing only portions of Haddad's subsequent proceedings to protect sensitive source-identifying material. Haddad's removal proceedings before the immigration judge have now been completed, and he has been ordered removed. In issuing the order, the immigration judge specifically found that Haddad poses "a substantial risk to the national security of the United States," on the basis of his direct ties to a "Specially Designated Global Terrorist" organization and other information contained in a sealed declaration. *In re Removal Proceedings for Rabih Sami Haddad,* No. A 79 546 461 (Immg. Ct. Nov. 22, 2002), slip op. 14-15.[4]

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[4] Haddad's appeal of his removal order and a separate order denying him release on bond are currently pending before the

While the government disagrees with the Sixth Circuit's order, it directly pertained only to proceedings concerning Haddad, whose identity and background had already been widely disseminated in the press. Moreover, Haddad's removal proceedings before the immigration judge are now complete. Indeed, immigration proceedings have now been completed for virtually all of the "special interest" aliens nationwide. As of the filing of this brief, only one "special interest" alien faces any realistic possibility of future immigration proceedings before an immigration judge.[5] As a result,

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Board of Immigration Appeals. Proceedings before that tribunal are not governed by the Creppy Memorandum, and the court of appeals' decision did not address a public right of access to such administrative appeals.

[5] With respect to that one alien, removability has already been established because the alien is subject to a prior final order of removal that has been reinstated following his illegal reentry into the United States, see 8 U.S.C. 1231(a)(5). Because the alien has requested withholding of removal, he will be entitled to a hearing before an immigration judge on his application for relief if he can make a threshold showing of a "reasonable fear of persecution or torture." 8 C.F.R. 241.8(e), 208.31. But wholly apart from the Creppy Memorandum, such a proceeding would separately be subject to closure under a regulation providing for closure of proceedings on applications for asylum or withholding of removal upon the request of the alien in order to protect his privacy and safety. See 8 C.F.R. 1240.11(c)(3)(i) (2003).

There are three other aliens in the United States who remain designated as "special interest" cases and have a theoretical possibility of facing further immigration proceedings. In reality, however, they face no reasonable likelihood of proceedings before an immigration judge at any time in the foreseeable future, if at all. One of those aliens is Haddad who, as noted *supra*, has completed his proceedings before the immigration judge and been ordered removed. The second alien has been transferred from the custody of the Bureau of Immigration and Customs Enforcement (for-

the Sixth Circuit's ruling, though inconsistent with the decision of the Third Circuit in the case at hand, has little continuing practical effect for the government.

Finally, the governmental procedures and regulations that gave rise to the present litigation are currently under review and will likely be revised to reflect the government's practical experience dealing with these unique cases, the government's increased knowledge about terrorism threats and operations, and overall governmental restructuring designed to enhance the security and effectiveness of its response to terrorist threats and attacks. For example, the Department of Justice is reviewing the process for designating individuals as special interest aliens and the interagency processes for identifying immigration matters that implicate national security, intelligence matters, or sensitive law-enforcement proceedings.

In addition, the Executive Office for Immigration Review in the Department of Justice has already promulgated and is applying in appropriate circumstances an emergency interim regulation authorizing immigration judges to issue protective orders, accept documents under seal, and close proceedings where protected information may be discussed. See 67 Fed. Reg. 36,799 (2002) (codified at 8 C.F.R. 1003.46 (2003)). The government is currently reviewing this interim regulation in light of post-promulgation notice and comment, as well as practical experience arising from application

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merly, the Immigration and Naturalization Service) in connection with criminal proceedings and, in any event, already has a final removal order. The third alien is neither in active proceedings nor expected to face such proceedings in the foreseeable future because his case has been administratively closed.

of the regulation to protect sensitive information in individual cases.

In conjunction with its review of the emergency regulation, the government is also reviewing the Creppy Memorandum (which was issued in the immediate wake of the September 11th attacks), the closure regulation (now codified at 8 C.F.R. 1003.27 (2003)), and their accompanying governmental procedures. The government is undertaking that review with an eye to establishing comprehensive, integrated procedures to enhance the efficiency and effectiveness of the government's handling of acutely sensitive immigration proceedings like these in the future. Because changes resulting from this ongoing review process could alter substantially the very framework in which the constitutional question arose in this case and in *Detroit Free Press*, review at this juncture would be premature.[6]

2. Further review is also unnecessary because the Third Circuit's rejection of petitioners' facial challenge to the closure policy was correct. There is no general right of public access to Executive Branch proceedings or records. This Court has made it clear that there is no broad right of access to government *facilities*, see, *e.g.*, *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 14 (1978), or to government *records* or *information*, see, *e.g.*, *Los Angeles Police Dep't* v. *United Reporting Publ'g Co.*, 528 U.S. 32, 40 (1999). Nor is there any established right of access to government *proceedings*—"the press is regularly excluded from grand jury proceedings, [Supreme Court] conferences, [and] the meetings of

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[6] There are no other pending challenges to the closure of removal proceedings of special interest aliens subject to the Creppy Memorandum.

other official bodies gathered in executive session." *Branzburg* v. *Hayes*, 408 U.S. 665, 684-685 (1972).

The limited exception to those principles recognized by this Court in *Richmond Newspapers*, *supra*, was premised on a 1000-year "unbroken, uncontradicted history" of public access to criminal trials in Anglo-American law, running from "before the Norman Conquest" to the present. 448 U.S. at 565-573. The Constitution itself, U.S. Const. Amend. VI, reflects that historic practice. That tradition has no counterpart in the proceedings of the political Branches, to which the Constitution expressly grants only limited rights of access, see U.S. Const. Art. II, § 3; *id.* Art. I, § 5, Cl. 3; *id.* Art. I, § 9, Cl. 7; see also Pet. App. 23a-24a; *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 611 (1982) (O'Connor, J., concurring) ("I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials."). Consistent with that tradition of allowing for closure of proceedings by the political Branches, numerous Executive agencies have regulations that provide for non-public hearings—including, for example, under the vast Social Security program. See Pet. App. 24a-25a.

Nor is there any significant history of access to immigration proceedings in particular. By tradition, such hearings have either been categorically closed or subject to closure at the discretion of the administrator or the alien. Proceedings to exclude aliens detained at the border have been closed by statute or regulation for more than a century. See, *e.g.*, Act of Mar. 3, 1903, ch. 1012, § 25, 32 Stat. 1213; 8 C.F.R. 1240.32(a), 1240.11(c)(3)(i) (2003). Immigration proceedings (including removal proceedings) involving an abused alien child or spouse are closed by regulation. See 8 C.F.R.

1003.27(c) (2003). Asylum proceedings may be closed at the alien's request. See 8 C.F.R. 1240.11(c)(3)(i) (2003). All other immigration proceedings may be closed "[f]or the purpose of protecting witnesses, parties, or the public interest." 8 C.F.R. 1003.27(b) (2003). The Third Circuit properly recognized that a regulation containing such a broad reservation of closure authority "in the public interest" cannot furnish a basis for recognizing a *constitutional* right of access to the very category of hearings for which the regulations permit closure.

Finally, in determining that there is no First Amendment right of access to removal proceedings in special interest cases, the court of appeals properly considered both the obvious harms that could result from public access as well as the asserted benefits of such access. The court of appeals explained, in particular, that "public hearings would necessarily reveal sources and methods of investigation" to terrorist organizations monitoring the proceedings. Pet. App. 40a. Information about how and where individual aliens entered the country would give valuable information to terrorist organizations about the best means of entry to evade detection. *Id.* at 40a-41a. Information about what evidence the government has against members of a particular terrorist cell (and what evidence the government lacks) would assist terrorists in determining which cells to use for attack. *Id.* at 41a. Information that a particular alien had been detained or an attack plan discovered would permit terrorist organizations to accelerate the timing of a planned attack or to staff it with aliens who had not been detected. *Ibid.* Closed proceedings also protect aliens and potential witnesses, many of whom "have a substantial privacy interest in having their possible connection to the ongoing investigation kept undisclosed." *Id.* at 42a. Finally, case-by-

case (or hearing-by-hearing) closure determinations could themselves "expose critical information about which activities and patterns of behavior merit such closure," and create a risk that judges will erroneously conclude that individual cases, viewed in isolation, are not "sensitive enough to warrant closure." *Ibid.* The Executive's decision to close all proceedings involving particular categories of aliens, by contrast, allows consideration of the risks of disclosure without the possibility of harmful disclosure inherent in case-by-case or hearing-by-hearing proceedings.[7]

Quite apart from the harms that would result from opening removal proceedings involving special interest aliens to the press and public, removal proceedings in general are quite distinct from criminal trials, in ways that cut strongly against recognizing a First Amendment right of access. This Court has stressed that immigration matters are "vitally and intricately interwoven with contemporaneous practices in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," and for that reason are "so exclusively entrusted to the

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[7] In addition to arguing that closed proceedings violate their asserted First Amendment right of access, petitioners claim (Pet. 29) that the Creppy Memorandum violates immigration regulations. But closure under the Creppy Memorandum is fully consistent with regulations permitting closure "[f]or the purpose of protecting witnesses, parties, or the public interest," 8 C.F.R. 1003.27(b) (2003). See *Lopez* v. *Davis*, 531 U.S. 230, 243-244 (2001); see also 8 C.F.R. 1003.9 (2003) (allowing the Chief Immigration Judge to "[e]stablish[] operational policies"). Furthermore, petitioners lack a private, third-party right of action to enforce those regulations, see *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). In any event, that argument was not addressed or ruled on by the court of appeals and does not involve a conflict in authority.

political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952). The framework of strict scrutiny that petitioners seek to impose on the exercise of the power over immigration can scarcely be described as satisfying that requirement of deference. Under petitioners' approach (see Pet. 23, 25-26), each decision of each immigration judge to close any particular immigration hearing apparently would be subject to reexamination by the federal courts whenever the press or any member of the public sought to challenge a closure decision. That collateral litigation could cause serious delays in removal proceedings as the courts resolved whether the closure decision was warranted under strict scrutiny. It also would bristle with the possibility of unwitting disclosures and inappropriate judicial second-guessing of the Executive Branch's judgment that sensitive law-enforcement or national-security information should be shielded from public disclosure. Cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-491 (1999) (relying on similar concerns to reject a First Amendment-based "selective prosecution" defense to deportation).

Moreover, as the Court further explained in *American-Arab Anti-Discrimination Committee*, removal proceedings are not punitive in nature: "Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted." 525 U.S. at 491. That central premise of the Nation's immigration laws undermines petitioners' argument that it is necessary to extend the First Amendment right of access

recognized in criminal prosecutions to immigration proceedings in order to ensure the proper functioning of those laws.

In *Richmond Newspapers*, the Court rested its conclusion that the First Amendment secured a right of public access to criminal trials in large part on the fact that criminal trials seek to right a wrong done to particular victims and the public and serve a function of catharsis, thus precluding the possibility of vigilante justice. See 448 U.S. at 571. Immigration proceedings, by contrast, do not seek to right a wrong done to private individuals or the general public in that same way. Rather, they are intended to give effect to a sovereign determination that the presence of a particular kind of alien in the United States does not promote the national interest. Many aliens who are placed in removal proceedings are out of status or were never lawfully present in this Country in the first place. Moreover, in most cases, such as those just described, the facts rendering the alien removable are not even disputed, and frequently the only issue is whether the alien's application for discretionary relief from the Executive will be granted. That sort of discretionary determination by the Executive, which is akin to granting a pardon, see *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996), bears no resemblance to the criminal judicial proceedings that *Richmond Newspapers* and its progeny addressed.

In short, the court of appeals in the instant case properly declined to transmogrify a highly discretionary contemporary regulation that authorizes closure of immigration hearings to protect witnesses, parties, or the public interest, into a broad constitutional mandate of access to Executive Branch immigration proceedings. The court likewise properly acknowledged the

substantial structural barriers to constitutionalizing judicial superintendence of the Executive Branch's judgment that open proceedings would threaten vital national security, intelligence, and law-enforcement interests. While the Sixth Circuit's contrary decision in *Detroit Free Press* was, the government submits, wrongly decided, it has little practical impact at the present time, and the internal Executive Branch framework in which both this case and *Detroit Free Press* arose is under review. Accordingly, review by the Court of the constitutional question raised by petitioners is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court of the United States

NORTH JERSEY MEDIA GROUP INC.
and NEW JERSEY LAW JOURNAL,

Petitioners,

v.

JOHN ASHCROFT, Attorney General of the United States, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The government acknowledges (at 5) that there have already been more than 600 individuals subjected to secret hearings. That hundreds of individuals have been deprived of their liberty in secret, closed-door hearings in the United States has understandably generated enormous public attention and concern.

Notwithstanding the exceptional nature of this case, the government argues that review is not warranted because (1) the conflict with the Sixth Circuit's decision in *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), is inconsequential, (2) there are only a handful of "special interest" detainees remaining and the Creppy policy is currently under review, and (3) the decision below was correct. None of these reasons has any force.

1. The government acknowledges that the "Third and Sixth Circuits have issued divergent opinions," but contends that the conflict is "not sufficiently pressing or mature" because the Sixth Circuit decision "pertained" to only one alien's removal proceedings and those proceedings are now complete. Gov't Br. at 9, 10, 12. The government's contention is unpersuasive. Although the preliminary injunction in the Sixth Circuit directly applies to one alien's removal proceedings (Haddad), the court's *analysis* focused on the Creppy directive in general and is plainly applicable to all special interest cases in that circuit. *See, e.g.*, *Detroit Free Press*, 303 F.3d at 710 (finding Creppy directive "under-inclusive" and "over-inclusive"); *id.* at 707 (stating that "Creepy directive fails" requirement that closure occur upon "specific findings"). Indeed, in its *en banc* petition in the Sixth Circuit, the government itself stated that the decision's "rationale" was exceedingly "broad" and that both the "holding" *and*

"analysis" were squarely in conflict with the Third Circuit's decision. Gov't Reh'g Pet. at 1.

In short, the Sixth Circuit's analysis and holding clearly do not apply only to Haddad's removal proceedings; if the government seeks to close future proceedings in the Sixth Circuit, it will have to do so on a hearing-by-hearing basis, and may not rely on the Creppy directive. That stands in sharp contrast to the rule in the Third Circuit, where the government may continue to subject immigrants to secret, closed-door hearings, free of all public scrutiny. Where interests of this magnitude are at stake, the Court should not permit the government to operate under different standards depending on where in the country it happens to detain an individual – especially given the lack of any meaningful constraints on the government's ability to transfer special interest detainees to facilities within the Third Circuit.

2. The government appears implicitly to recognize that there is a genuine conflict between the Sixth and Third Circuits. The government thus argues that review should be denied because there are only four "special interest" detainees remaining in the country (only one of whom realistically faces future proceedings), and because the policy at issue here is under review and *might* change. Gov't Br. at 12 n.5, 13-14. Neither of those reasons is persuasive under the circumstances of this case.

a. The fact that there are currently only a few special interest detainees remaining is not a sufficient basis on which to oppose review because the Creppy policy remains in force and can be used at any time – an option the government does not foreclose. Thus, as an initial matter, the case plainly is not moot. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980) (lead

plurality opinion); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6 (1986) (*Press-Enterprise II*). Beyond that, however, the practical need for this Court's review remains compelling. If certiorari were denied, the government could again conduct hundreds of secret proceedings before the issue returned to this Court. Indeed, according to the Justice Department's own figures, it detained hundreds of individuals in the span of just seven weeks after September 11. *See* Dan Eggen and Susan Schmidt, *Count of Released Detainees is Hard to Pin Down*, Washington Post, Nov. 6, 2001. Thus, even assuming that future challenges were expedited by the courts, the practical effect of denying review at this time is potentially enormous.

Moreover, this is hardly the ordinary case in which the newspapers could bring a challenge any time the government again decides to invoke the Creppy directive. As noted in the Petition (at 5-6), the Creppy directive prohibits *all* public information about special interest cases. In fact, the government initially did not even disclose the existence of the Creppy policy itself, and it was some time before the public and press learned that the government had a policy of conducting closed-door hearings in this country. *See* William Glaberson, *Secret Trials; Closed Immigration Hearings Criticized as Prejudicial*, New York Times, Dec. 7, 2001. Consequently, as was true this time, it may be months before the public and press learn that the Creppy directive is being applied, if indeed they ever learn. Thus, denying review would raise more than just the prospect that the government could conduct hundreds more secret proceedings before another challenge could reach this Court. The very secrecy with which the government is operating makes it uncertain that such a challenge could ever be brought. At a minimum, it seems likely that the newspapers would be in the

same position petitioners are now, with the government having completed the bulk of its secret hearings before this Court could address the issue.

b. The government also notes that its policies are currently under "review." Gov't Br. at 10, 13-14. Yet, the government states only that some revision is "likely." *Id.* at 13. It does not give any guarantee that such revisions will occur or that such revisions will eliminate the blanket closure policy or special interest category. In fact, the government states only that it is currently "reviewing the *process* for designating individuals as special interest aliens," not that it is considering eliminating that category, much less eliminating the mandatory closure of such cases. *Id.* (emphasis added).

If the government ultimately chooses to revise its current policy in a meaningful way, it can inform the Court of the actual changes and the Court could then decide whether to dismiss the case. But, with a case of this magnitude, the Court should not deny certiorari based on the government's vague assurance that it *may* revise its policies at some undisclosed future time and that those revisions *may* alter the legal framework. That would leave a direct circuit conflict in place and allow the government to continue to conduct secret hearings anywhere within the Third Circuit.

3. The government further argues (at 14-20) that review is not warranted because the Third Circuit's decision was correct. The newspapers addressed the merits in their Petition (at 24-29), and make only the following additional points.

a. The government asserts (at 15) that "numerous Executive agencies have regulations that provide for non-public hearings – including, for example, under the vast

Social Security program." But, the newspapers have not argued that all agency hearings must be open. The deportation process involves formal, trial-type adjudicatory proceedings in which the government has undertaken coercive enforcement action to deprive an individual of liberty. *See generally* 8 U.S.C. 1229a (1999 & West Supp. 2003); 8 C.F.R. 1240.1-1240.16 (2003). Deportation proceedings are thus readily distinguishable from most, if not all, other Executive agency hearings. That is particularly true with respect to social security proceedings, which this Court has noted are conducted in an "informal, nonadversary manner;" indeed, the Court has observed that social security hearings are "perhaps the best example" of an agency proceeding that is *not* based on the "judicial model." *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000) (citations and internal quotation marks omitted); *see also id.* at 110 ("The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings").

b. The government vastly understates the tradition of openness in the deportation process. Contrary to the government's contention (at 15-16), the access regulations that have been in place since 1964 do not support the Third Circuit's decision. The regulations pointedly state that proceedings "shall be open" and then provide for certain narrow exceptions to open deportation proceedings. Moreover, of these exceptions, only child abuse cases are mandatorily closed. *See* App. 104a-105a. Even in the criminal context, there are exceptions to the tradition of openness. *See Globe Newspaper, Inc. v. Superior Court*, 457 U.S. 596, 612 (1982) (Burger, C.J., dissenting) (noting exceptions).

Furthermore, the government ignores the fact that access to deportation hearings did not begin with the 1964 regulations. Unlike exclusion proceedings, neither Congress nor the governing agencies have ever enacted a provision closing the deportation process. App. 26a-28a. The press and public thus attended deportation proceedings long before enactment of the 1964 regulations made the right of public access explicit. *See, e.g., Matter of M___*, 5 I. & N. Dec. 261, 262 (BIA 1953) (noting that "members of the press were permitted to be present during the hearing" and denying alien's claim that adverse newspaper publicity made the hearing unfair); Alexander Feinberg, *U.S. Charges Santo with Communism at Tense Hearing*, New York Times, Sept. 12, 1947 ("fifty [union] men and women were admitted" to the hearing); *Union Head Was Communist, He Admits at Alien Hearing*, New York Times, Nov. 2, 1947 (hearing "attended by 100 persons"); *Smith Again Silent At Hearing By U.S.; Officer of the NMU Refuses to Defend Himself Against Charge of Communism*, New York Times, Apr. 9, 1948 (open hearing of alleged alien Communist); *Clash Marks Hearing on Doyle As Alien*, New York Times, Mar. 26, 1948 (same); *Joe Adonis Goes on Trial in Jail*, New York Times, Apr. 28, 1953 (deportation hearing inside prison of alleged mafia member was "attended also by three newspaper reporters"); *Belfrage is Silent on Red Affiliation*, New York Times, Aug. 11, 1954 ("public hearing in a deportation proceeding"). *See generally Martens' Hearing Doors are Closed*, Washington Post, Apr. 1, 1920 (noting deportation hearing of Soviet representative was closed, but that "[s]uch hearings usually are open").

The government also ignores the larger context and traditions surrounding the government's use of its coercive power to deprive individuals of liberty. By the mid-1600s,

it was already the case in England that there were few, if any, instances where a formal adjudicatory proceeding would be closed where the proceeding involved the use of the government's enforcement powers to deprive an individual of liberty.[1] Indeed, the story of Anglo-American law is in no small part the story of rebellion against summary and secret proceedings to deprive an individual of liberty. *In re Oliver*, 333 U.S. 257, 268-71 (1948).

c. The government makes much of the notion that the courts generally must defer to the political branches on immigration policy. Gov't Br. at 17-19. But it is the very fact that the courts will not question the wisdom of substantive immigration policy that makes public access to the deportation process absolutely essential. Where the political process is the only meaningful institutional check on a process that so profoundly affects the lives of so many people, the public must be able to see for itself how the immigration laws are being implemented in order to make "informed" judgments about the process. *Globe Newspaper*, 457 U.S. at 605.

Relatedly, the government contends (at 19) that a right of access should not be recognized because often the only issue at a deportation hearing may be whether to award the alien "discretionary" relief from deportation.

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[1] *See, e.g.*, Act of 1662, 14 Car. II, c.12, §§ 1-2 (removal of transient poor from local parishes to their place of settlement in open quarter sessions); *id.* § 6 (determination in open quarter sessions whether beggars, the idle poor, and others were "fitt to be transported to the English Plantations [beyond the seas]" as indentured servants); Sir Thomas Skyrme, *History of the Justices of the Peace* 202 (2d ed. 1994) (by early 1600s quarter sessions "had become the hub of county affairs around which the whole community revolved" and "were attended by everyone").

Yet, it is precisely because immigration judges do exercise such enormous discretionary power over the lives of individuals that public scrutiny is so critical. The decision to grant or deny discretionary relief literally determines the fate of thousands of immigrants each year, many of whom may be long-term residents of this country who have lived here all their lives and whose spouses and children are U.S. citizens. *See INS v. St. Cyr*, 533 U.S. 289, 295-96 (2001). If denied relief, these individuals and their families will face profound choices, including whether to separate as a family so that the children may remain in the United States to realize a better life. The government takes pains to emphasize that no immigrant has an absolute right to such discretionary relief. That is indeed true, and it means that the decision to deny relief will be largely unreviewable in the courts. But that only increases the importance of public scrutiny as the principal check on the "integrity" of the process. *Richmond Newspapers*, 448 U.S. at 578 (lead plurality opinion); *Globe Newspaper*, 457 U.S. at 606 (public scrutiny "enhances the quality and safeguards the integrity" of the process); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (*Press-Enterprise I*) (same).

Moreover, it is not simply that access enhances the fairness of the process. Access ensures the "appearance of fairness." *Press-Enterprise II*, 478 U.S. at 9 (quoting *Press-Enterprise I*, 464 U.S. at 508); *Globe Newspaper*, 457 U.S. at 606 (same). The legitimacy of any system of law ultimately depends on the public's confidence in the fairness of that system. But, as this Court has stressed, public confidence cannot be sustained, and will quickly erode, where justice is administered behind closed doors. *See Press-Enterprise I*, 464 U.S. at 508. This recognition that

legal tribunals must not only do justice, but also display justice, carries special force in the deportation context.

Throughout the country's history, successive generations of immigrants from every part of the world have settled here, creating communities of legal residents and first-generation citizens. Today, few areas of the country contain more of these communities than the regions in which petitioners' papers are published and read. These communities believe deeply in the rule of law; indeed, for these communities it is often the rule of law that separates the United States from the countries they left behind. As a result, they accept the deportation process and the hardship it brings. But that faith cannot endure if the process is shielded from public view.

d. Finally, the government contends that, even assuming there is a right of access, the Creppy directive's blanket closure policy can survive First Amendment scrutiny because the traditional case-by-case closure approach will undermine national security. As we explained in the Petition (at 6-9), the directive is both over- and under-inclusive. The government's brief only reinforces that point. The government acknowledges (at 11) that in the Sixth Circuit it chose not to seek a stay from this Court or to close all of Haddad's future hearings, even though the government's legal position is that every minute of every hearing must be closed. The government offers no explanation for its actions, other than to state indirectly that Haddad's "identity and background had already been widely disseminated in the press." Gov't Br. at 12. Yet, that is the point. There invariably will be cases where it is unnecessary to close the proceedings in their entirety. That is why this Court has insisted on case-specific findings before it will sanction closure. *Globe*

Newspaper, 457 U.S. at 608-09 (invalidating mandatory, blanket closure rule).

* * *

For the reasons stated above, and in the Petition, the newspapers respectfully request that the Court grant the Petition for Certiorari.

Respectfully submitted,

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